19

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1913

No. [illegible] 41

DANIEL W. BAKER, PLAINTIFF IN ERROR,

vs.

BRAINERD H. WARNER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 13, 1911.

(22,733)

(22,733)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 326.

DANIEL W. BAKER, PLAINTIFF IN ERROR,

vs.

BRAINERD H. WARNER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1913.

In the Court of Appeals of the District of Columbia.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

Supreme Court of the District of Columbia.

At Law. No. 50411.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINERD H. WARNER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed March 31, 1908.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

At Law. No. 50411.

DANIEL W. BAKER, Plaintiff,
v.
BRAINERD H. WARNER, Defendant.

The plaintiff, Daniel W. Baker, sues the defendant, Brainerd H. Warner for that, whereas, the plaintiff is and ever has been a good and lawful citizen and until the happening of the grievances hereinafter mentioned, has always been considered an upright and honorable man, and whereas, the plaintiff has been, since the 1st day of September, A. D. 1905, and now is the United States Attorney for

the District of Columbia, which said office he holds by virtue o
appointment by the President of the United States, by and with th
advice and consent of the Senate of the United States; and whereas
as such United States Attorney for the District of Columbia, it is th
plaintiff's duty to present to the grand jury in and for said Distric
of Columbia all violations committed in said District of the law
against crimes and misdemeanors in force in said District and t
prosecute before the courts of said District, in the name of the Unite
States, all persons charged with the violation of any of said
2 laws; and whereas, the Washington Jockey Club, a body cor
porate, owns a race track or course in said District of Colum
bia whereon there are held contests of speed between horses, which
said contests are commonly known as horse races; and whereas at
the time of the grievances hereinafter complained of, the said body
corporate was daily having take place at its race track or course
aforesaid the contests or races aforesaid, the same commencing the
23d day of March, 1908, and continuing daily since until the date
of the grievance hereinafter complained of, and advertised to con-
tinue until the 14th day of April, 1908, a period of three weeks,
which said period is known as said body corporate's "Spring Meet";
and whereas, during such contest divers persons congregate in,
around and about said race course or track and make bets or lay
wagers upon the result of said races; and whereas, if such laying
of bets or making of wagers at such race course or track constitutes
a violation of any of the laws in force in the District of Columbia,
it is the duty of the plaintiff to present the persons laying such bets
or making such wagers to the grand jury of the said District for
indictment for such violation; and whereas, the plaintiff did, on,
to wit, the 25th day of January, A. D. 1908, present to the grand
jury one John Walters and charged that said Walters, in taking
wagers at said race track or course, was setting up a gaming table
contrary to the statutes in force in said District against setting up
gaming tables, and said grand jury on, to wit, the 28th day of Janu-
ary, A. D. 1908, returned and presented to the Supreme Court of the
District of Columbia an indictment against said Walters,
3 charging him with a violation of said statutes, to which said
indictment said Walters on, to wit, the 8th day of February,
A. D. 1908, interposed a demurrer, which said demurrer was, on, to
wit, the 11th day of March, A. D. 1908, by the Associate Justice of the
said Supreme Court of the District of Columbia presiding in the
criminal branch of said Court, sustained, said Justice holding that
said laying of bets or making of wagers at said race course or track,
was not a violation of any law in force in said District; and whereas,
the plaintiff, as such United States Attorney for the District of
Columbia, as aforesaid, is now engaged in prosecuting an appeal
from said decision of said Justice to the Court of Appeals of said
District of Columbia, for the purpose of having said court determine
whether or not such laying of bets or making of wagers at said race
track or course is unlawful and contrary to the statutes of the Dis-
trict of Columbia against crimes or misdemeanors; and whereas,
pending said determination of said question by said Court of Appeals,

the plaintiff, conforming himself as it is his duty to do to the law as judicially construed, as aforesaid, by the said Associate Justice of the said Supreme Court of the District of Columbia, has not ordered the issuance of warrants for the arrest of, or presented to the grand jury of said District, any persons for laying bets or making wagers on said contests at said race course or track as aforesaid; and whereas the said defendant aforesaid, Brainerd H. Warner, was, at the time of the grievances hereinafter mentioned, and still is, a candidate for nomination by the republican party for the office of Representative in the Congress of the United States from the
4 Sixth Congressional District of the State of Maryland; and whereas The Washington Herald Company has been publishing in its paper, The Washington Herald, for many days previous to, and since, the date of the grievances hereinafter complained of, numerous articles or advertisements in support of the said candidacy of the said defendant, Brainerd H. Warner, which said articles the said defendant, Brainerd H. Warner, has caused to be published in said Washington Herald, and has paid the said Washington Herald Company for publishing; and whereas, the said The Washington Herald Company aforesaid, in addition to publishing the said paper aforesaid, has sold and circulated the same in the City of Washington and in the District of Columbia, and throughout the whole of the United States of America, in the American countries adjacent thereto and in foreign countries; and whereas, notwithstanding the fact that the said plaintiff has always conducted himself as an honest, upright citizen and has always properly conducted himself in his said office as United States Attorney for the District of Columbia heretofore mentioned; and whereas, the said plaintiff has heretofore and now is performing the duties as United States Attorney for the District of Columbia in an upright, honest and dignified manner, yet the said defendant, Brainerd H. Warner, well knowing the premises, but maliciously, wickedly and fraudulently contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney for the District of Columbia aforesaid, did, heretofore, to wit, on the 28th day of March, A. D. 1908, compose, publish and cause and procure
5 to be composed and published, of and concerning the said plaintiff, and of and concerning the said office of the said plaintiff in the said newspaper called "The Washington Herald" of date, to wit, March 28, 1908, the same being published in the City of Washington, District of Columbia, and widely circulated among the people of the whole United States and in the countries aforesaid, and particularly in the said city of Washington, District of Columbia, a certain false, scandalous, malicious and defamatory libel of the tenor following, to wit:

"*Warner's Political Contest.*"

(Meaning thereby the contest of said defendant, Brainerd H. Warner, for said nomination for the office of Representative in the Congress of the United States from the Sixth Congressional District of Maryland, aforesaid).

"Col. Pearre (meaning thereby Honorable George A. Pearre, Representative in the Sixtieth Congress of the United States from t Sixth Congressional District of Maryland) said in his great o slaught on Mr. Warner (meaning the defendant Brainerd H Warner) a few days ago:

"'I regard his candidacy as a joke. If I had a monkey an hand-organ, I could get up a crowd anywhere.'

"This was a fine expression for a statesman (meaning sa Pearre), but not wanting in dignity so much as a justice of th Supreme Court of the District of Columbia (meaning thereb
6 the Honorable Ashley M. Gould, Associate Justice of th Supreme Court of the District of Columbia) who, with th United States district attorney (meaning the plaintiff), went Rockville (meaning the town of Rockville, County of Montgomer State of Maryland) last Saturday (meaning Saturday, the 21st da of March, A. D. 1908) to attend a conference of Mr. Warner (meaning defendant Brainerd H. Warner) enemies and determin what ammunition was needed to defeat him.

"The question now is, Where does the money come from in th contest against Mr. Warner? (Meaning the defendant Brainerd H Warner.)

"How about the race track?

LAWYER."

Meaning thereby, and intending to convey and actually convey ing that the said plaintiff entered into a conference with the sa Ashley M. Gould, Associate Justice of the said Supreme Court of th District of Columbia as aforesaid, and other persons, at the tow of Rockville at the time mentioned, for the purpose of determinin what funds were necessary, and how same should be raised, to b used in the campaign on behalf of the said Honorable George A Pearre against the said defendant, Brainerd H. Warner, for the sai nomination for the office of Representative in the Congress of th United States as aforesaid, and that the said plaintiff was obtainin money or funds for use in the said campaign from the said
7 Washington Jockey Club, or the persons engaged in layin bets or making wagers at the race track or course aforesaid or from some other person or persons interested in the said rac track or course, or in the laying of bets or the making of wager at the said race track or course as aforesaid, and meaning and in tending to convey and actually conveying that the said plaintiff was and is being corrupt in the conduct of his official duties a United States Attorney of the District of Columbia, as aforesaid, i not presenting to the grand jury and prosecuting before the courts o the said District the person or persons laying bets or making wager upon the said contests at the said race track or course as aforesaid, i consideration of contributions of money for use in the said contes against the said defendant, Brainerd H. Warner, from some com pany, person or persons interested in the said race track or course or the contests carried on thereon, or the laying of bets or makin of wagers thereon upon said contests. Which said false, scandalous malicious and defamatory libel was composed and published, an

caused and procured to be composed and published as aforesaid by the said defendant, of and concerning the said plaintiff, said defendant meaning and intending thereby to charge that the said plaintiff was a corrupt, dishonest and unworthy person, and was being influenced in the discharge of his duties as United States Attorney for the District of Columbia by the fact that same person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling permitted thereon, was contributing money to be used against the candidacy of the said defendant, Brainerd H. Warner, for the office of Representative in the Congress of the United States as aforesaid, by means of which said false and scandalous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation, and brought into scorn, scandal, infamy and disgrace in so much as divers good and lawful citizens have, by reason of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievance, from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as the United States Attorney for the District of Columbia aforesaid, to the damage of the said plaintiff in the sum of Fifty Thousand Dollars ($50,000.00).

And the plaintiff claims said sum of Fifty Thousand Dollars ($50,000.00) besides the costs of this suit.

Second Count.

And the plaintiff, Daniel W. Baker, sues the defendant, Brainerd H. Warner, for that, whereas, the plaintiff is and ever has been a good and lawful citizen and until the happening of the grievances hereinafter mentioned, has always been considered an upright and honorable man, and whereas, the plaintiff has been, since the 1st day of September, A. D. 1905, and now is the United States Attorney for the District of Columbia, which said office he holds by virtue of appointment by the President of the United States, by and with the advice and consent of the Senate of the United States; and whereas, as such United States Attorney for the District of Columbia, it is the plaintiff's duty to present to the grand jury in and for said District of Columbia all violations committed in said District of the laws against crimes and misdemeanors in force in said District and to prosecute before the courts of said District, in the name of the United States, all persons charged with the violation of any of said laws; and whereas, the Washington Jockey Club, a body corporate, owns a race track or course in said District of Columbia whereon there are held contests of speed between horses, which said contests are commonly known as horse races; and whereas at the time of the grievances hereinafter complained of, the said body corporate was daily having take place at its race track or course aforesaid the contests or races aforesaid, the

same commencing the 23d day of March, 1908, and continuing daily since until the date of the grievance hereinafter complained of, and advertised to continue until the 14th day of April, 1908, a period of three weeks, which said period is known as said body corporate's "Spring Meet;" and whereas, during such contest divers persons congregate in, around and about said race course or track and make bets or lay wagers upon the result of said races; and whereas, if such laying of bets or making of wagers at such race course or track constitutes a violation of any of the laws in force in the District of Columbia, it is the duty of the plaintiff to present the persons laying such bets or making such wagers to the
10 grand jury of the said District for indictment for such violation; and whereas, the plaintiff did, on, to wit, the 25th day of January, A. D. 1908, present to the grand jury one John Walters and charged that said Walters, in taking wagers at said race track or course, was setting up a gaming table contrary to the statutes in force in said District against setting up gaming tables, and said grand jury on, to wit, the 28th day of January, A. D. 1908, returned and presented to the Supreme Court of the District of Columbia an indictment against said Walters, charging him with a violation of said statute, to which said indictment said Walters, on, to wit, the 8th day of February, A. D. 1908, interposed a demurrer, which said demurrer was, on, to wit, the 11th day of March, A. D. 1908, by the Associate Justice of the said Supreme Court of the District of Columbia presiding in the criminal branch of said Court, sustained, said Justice holding that said laying of bets or making of wagers at said race course or track, was not a violation of any law in force in said District; and whereas, the plaintiff, as such United States Attorney for the District of Columbia, as aforesaid, is now engaged in prosecuting an appeal from said decision of said Justice to the Court of Appeals of said District of Columbia, for the purpose of having said Court determine whether or not such laying of bets or making of wagers at said race track or course is unlawful and contrary to the statutes of the District of Columbia against crimes or misdemeanors; and whereas, pending said determination of said question by said Court of Appeals, the plaintiff conforming himself as it is his duty to do to the law as
11 judicially construed, as aforesaid, by the said Associate Justice of the said Supreme Court of the District of Columbia, has not ordered the issuance of warrants for the arrest of, or presented to the grand jury of said District, any persons for laying bets or making wagers on said contests at said race course or track as aforesaid; and whereas the said defendant aforesaid was, at the time of the grievances hereinafter mentioned, and still is, a candidate for nomination by the republican party for the office of Representative in the Congress of the United States from the Sixth Congressional District of the State of Maryland; and whereas The Washington Herald Company has been publishing in its paper The Washington Herald, for many days previous to, and since the date of the grievances hereinafter complained of, numerous articles or advertisements in support of the said candidacy of the said defendant, Brainerd H. Warner, which said articles the said

defendant has caused to be published in said Washington Herald, and has paid the said Washington Herald Company for publishing; and whereas, the said The Washington Herald Company, in addition to publishing the said paper aforesaid, has sold and circulated the same in the City of Washington and in the District of Columbia, and throughout the whole of the United States of America, — in the American countries adjacent thereto, and in foreign countries; and whereas, notwithstanding the fact that the said plaintiff has always conducted himself as an honest, upright citizen and has always properly conducted himself in his said office as United States Attorney for the District of Columbia heretofore mentioned; and

12 whereas, the said plaintiff has heretofore and now is performing the duties as United States Attorney for the District of Columbia in an upright, honest and dignified manner, yet the said defendant, Brainerd H. Warner, well knowing the premises, but maliciously, wickedly and fraudulently contriving to injure the plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney for the District of Columbia aforesaid, did, heretofore, to wit, on the 28th day of March, A. D. 1908, compose, publish, and cause and procure to be composed and published, of and concerning the said plaintiff, and of and concerning the said office of the said plaintiff in the said newspaper called "The Washington Herald" of date, to wit, March 28, 1908, the same being published in the City of Washington, District of Columbia, and widely circulated among the people of the whole United States and in the countries aforesaid, and particularly in the said City of Washington, District of Columbia, a certain false, scandalous, malicious, and defamatory libel of the tenor following, to wit:

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(Meaning thereby the contest of said defendant, Brainerd H. Warner, for said nomination for the office of Representative in the Congress of the United States from the Sixth Congressional District of Maryland, aforesaid.)

"Col. Pearre (meaning thereby Honorable George A. Pearre, a Representative in the Sixtieth Congress of the United States from the Sixth Congressional District of Maryland) said in his

13 great onslaught on Mr. Warner (meaning the defendant) a few days ago;

"'I regard his candidacy as a joke. If I had a monkey and hand-organ, I could get up a crowd anywhere.'

"This was a fine expression for a statesman (meaning said Pearre), but not wanting in dignity so much as a justice of the Supreme Court of the District of Columbia (meaning thereby the Honorable Ashley M. Gould, Associate Justice of the Supreme Court of the District of Columbia) who, with the United States district attorney (meaning the plaintiff), went to Rockville (meaning the town of Rockville, County of Montgomery, State of Maryland) last Saturday (meaning Saturday, the 21st day of March, A. D. 1908)

to attend a conference of Mr. Warner's (meaning defendant, Brainerd H. Warner) enemies and determine what ammunition was needed to defeat him.

"The question now is, Where does the money come from in the contest against Mr. Warner? (Meaning the defendant Brainerd H. Warner.)

"How about the race track?

LAWYER."

Meaning thereby and intending to convey, and actually conveying that the said plaintiff, in the performance of his duties as United States Attorney for the District of Columbia as aforesaid, has acted and is acting corruptly, and was and is being influenced in
14 the discharge of his duties as United States Attorney for the District of Columbia, by reason of the fact that some person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling permitted or carried on thereon, was contributing money to be used against the candidacy of the said defendant for the office of Representative in the Congress of the United States as aforesaid, by means of which said false and scandalous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation, and brought into scorn, scandal, infamy and disgrace in so much as divers good and lawful citizens have, by reason of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievance, from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as the United States Attorney for the District of Columbia aforesaid; to the damage of the said plaintiff in the sum of Fifty Thousand Dollars ($50,000.00).

And the plaintiff claims said sum of Fifty Thousand Dollars ($50,000.00) besides the costs of this suit.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff.

15 *Notice to Plead.*

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff.

Plea.

Filed April 15, 1908.

In the Supreme Court of the District of Columbia.

No. 50411. At Law.

DANIEL W. BAKER,
vs.
BRAINERD H. WARNER.

The defendant, for plea to the plaintiff's declaration, says that he is not guilty as alleged.

J. J. DARLINGTON,
Att'y for Def't.

(W.)

16 *Joinder of Issue.*

Filed April 18, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50411.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINARD H. WARNER, Defendant.

The plaintiff joins issue on the defendant's plea.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff.

Memorandum.

March 17, 1909.—Verdict for Plaintiff for $10,000.00.

Motion in Arrest of Judgment.

Filed March 19, 1909.

In the Supreme Court of the District of Columbia.

No. 50411. At Law.

DANIEL W. BAKER
vs.
BRAINERD H. WARNER.

Comes now here the defendant, Brainerd H. Warner, and moves the court to arrest the judgment on the verdict in this cause, for the reasons following, among others, namely:

17 1. Because of the fatal defects apparent on the face of
declaration stated to the court in the course of the trial.

2. Because no basis is laid in either the inducement or the
loquium of the declaration to admit of the construction of the arti
in suit given by the court or any construction of a libellous or
ionable character.

3. Because neither the inducement nor the colloquium of the d
laration alleges that the Washington Jockey Club or bookmakers
any one interested in gambling at the race track were sources fr
which the plaintiff, by reason of his official position or otherwi
might unlawfully or improperly obtain money.

4. Because neither the inducement nor the colloquium of
declaration alleges that the words complained of in the article
suit were written or published with reference to any illegal or
proper obtaining of money by the plaintiff from the Washing
Jockey Club, its race track, gamblers, or any one interested in
Washington Jockey Club, its race track, or gambling thereat or the
about.

5. Because neither the inducement nor the colloquium of the d
laration alleges that the words complained of in the article in
were written or published with reference to the non-prosecution
the race track gamblers or with reference to the performance or n
performance of any official duty whatever owing by the plaintiff

6. Because neither the inducement nor the colloquium of
declaration alleges that the words complained of in the article
suit were written or published with reference to the obta
18 ing of money at all, or with reference to the Washing
Jockey Club, or with reference to its race track, or with
erence to gamblers or gambling at its race track, or with refere
to any race track, gamblers or gambling at any place or at any ti

7. Because of other defects apparent on the face of the decla
tion.

J. J. DARLINGTON.
Attorney for Defendant
S.

Notice.

Messrs. Henry E. Davis and Frank J. Hogan:

Please take notice that the foregoing and annexed motion will
called to the attention of the court for its action on Friday, th
the 26th day of March, A. D. 1909, at ten o'clock a. m., or so so
thereafter as counsel can be heard.

J. J. DARLINGTON.
Attorney for Defendant
S.

Service acknowledged this 19th day of March, A. D. 1909
FRANK J. HOGAN.
Attorney for Plaintiff.
S.

19 Supreme Court of the District of Columbia.

FRIDAY, *April 2d*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

No. 50111. At Law.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINERD H. WARNER, Def't.

Now come on for hearing defendant's motions For a New Trial and In Arrest of Judgment, filed herein by his attorney Mr. J. J. Darlington, who states in open court that he does not desire to argue said motions; whereupon, it is ordered, that said motions be, and the same are hereby overruled, and that judgment on verdict be entered. Wherefore, it is considered and adjudged, that the plaintiff herein recover of defendant herein the sum of Ten Thousand Dollars $10,000.00 for his damages as aforesaid assessed by reason of the premises, with interest from this date together with costs of suit to be taxed by the clerk, and have execution thereof.

From the aforegoing, the defendant by his attorney in open court notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a Supersedeas, is hereby fixed in the sum of Twelve Thousand (12,000) Dollars.

20 *Memorandum.*

April 8, 1909.—Supersedeas bond approved and filed.

21 In the Supreme Court of the District of Columbia.

Filed Apr. 8, 1909. J. R. Young, Clerk.

At Law. No. 50111.

BAKER
vs.
WARNER.

The President of the United States to Daniel W. Baker, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an appeal entered in The Supreme Court of the District of Columbia, on the 2d day of April, 1909, wherein Brainerd H. Warner is appellant, and you are Appellee, to show cause, if any there be, why the

judgment rendered against the said Appellant, should not
rected, and why speedy justice should not be done to the pa
that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice
Supreme Court of the District of Columbia, this 8th day of A
the year of our Lord one thousand nine hundred and nine

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, C
By H. BINGHAM,
Ass't C

Service of the above Citation accepted this 8th day of April,
D. W. BAKER,
Attorney for Appe

[Endorsed:] 1. No. 50411. Law. Baker vs. Warner. Ci
Issued Apr. 8, 1909. Filed Apr 8, 1909. J. R. Young, Clerk.

22 Supreme Court of the District of Columbia.

MONDAY, *November 29th*, 19

Session resumed pursuant to adjournment. Hon. Harry M
baugh, Chief Justice presiding.

* * * * * * *

No. 50411. At Law.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINERD H. WARNER, Def't.

The Court having this day signed the Bill of Exceptions he
fore submitted herein, now orders the same of record as of the
of the noting thereof at the trial.

Further the time within which to file a transcript of the r
herein in the Court of Appeals, is hereby extended to and incl
January 15th, 1910.

Bill of Exceptions.

Filed November 29, 1909.

In the Supreme Court of the District of Columbia.

No. 50411. At Law.

DANIEL W. BAKER, Plaintiff,
vs.
BRAINERD H. WARNER, Defendant.

Be it remembered that the above entitled cause came on for
on the 25th day of February, A. D. 1909, before the
23 Harry M. Clabaugh, Chief Justice of the Supreme Cou
the District of Columbia, and a jury empanelled and s

to try the issues between the parties, whereupon the plaintiff, to maintain the issues upon his part joined, offered testimony to prove that on or before the 20th day of March, 1908, the defendant contracted for the insertion of a daily advertisement by him, for ten successive days, in the Washington Herald, a newspaper published in the City of Washington, having a daily circulation of 20,890 copies, of which 4,000 or 5,000 copies were circulated outside of the District of Columbia, mostly in Virginia, and that the defendant, accordingly, furnished copy for his said advertisements which were inserted and published in the said Herald from March 24 to April 8, 1908, inclusive, that an advertisement appeared in the said Herald of March 28, 1908, the copy for which was furnished by the defendant, in his own handwriting, and another of his said advertisements, so furnished by him, appeared on the 30th day of March, 1908, whereupon the plaintiff offered in evidence copies of the issues of the said Herald newspaper from March 24 to April 8, 1908, each containing one of the series of advertisements so published for the defendant, under his said contract, whereupon the following occurred, Mr. Darlington being attorney for the defendant, and Mr. Hogan and Mr. Davis attorneys for the plaintiff:

"Mr. DARLINGTON: I have no objection to your offering the issues of March 28th and March 30th. I would like to see any others which you may offer as containing the advertisement appearing during that period. When they are formally offered, I shall want to look at them and make objections if I have any.

"Mr. HOGAN: I also offer at the same time, while this witness is on the stand, the original copies. I offer all of them as part of the contract, but particularly the two issues I spoke about.

"Mr. DARLINGTON: I have no objection to your offering in evidence the copy of the issues of the 28th and 30th, and when the others are read I will look at them to see if there is anything objectionable."

And thereupon counsel for the plaintiff read in evidence to the jury the advertisements in the issues of March 28th and 30th, in the words and figures following; to wit:

"Warner's Political Contest."

"Col. Pearre said in his great onslaught on Mr. Warner a few days ago:

"I regard his candidacy as a joke. If I had a monkey and hand-organ I could get up a crowd anywhere.

"This was a fine expression for a statesman, but not wanting in dignity so much as a Justice of the Supreme Court of the District of Columbia who, with the U. S. District Attorney, went to Rockville last Saturday to attend a conference of Mr. Warner's enemies and determine what ammunition was needed to defeat him.

"The question now is Where does the money come from in the contest against Mr. Warner?

"How about the race track?

LAWYER."

25 The said advertisement of March 30th, the copy for which was handed in by the defendant for publication on March 29th, was as follows:

Warner's Campaign for Congress.

"What a desperate fight he has on hand. Justice Gould of the U. S. Supreme Court of the District of Columbia and Hon. D. W. Baker, U. S. District Attorney for the District of Columbia, are against him.

"They both attended the anti-Warner conference at Rockville a week ago Saturday, where a general discussion was indulged in as to how Warner could be beaten.

"Why not stay at home and try and close the Race Track Scandal.

ROCKVILLE."

And thereupon the following occurred:

"Mr. DARLINGTON: In offering these papers, do you offer the whole paper; everything in the issue that related to the race track?

"Mr. HOGAN: Yes.

"Mr. DARLINGTON: Everything in the issue about the race track will go in?

"Mr. HOGAN: Yes."

Whereupon, upon cross examination, the witness testified that he could not tell when the copy for the advertisement published in the issue of March 28 was received by the Herald Company, but that it and the advertisement of the 30th must have been received the day before the date of publication "because the copy used to

26 come in every day," thereupon in connection with said cross-examination of said witness by counsel for defendant the following occurred:

"Q. Your file of Heralds began March 21, I notice? A. Yes.

"Q. The race track agitation, as you call it, began March 6. I mean the race track publication in the paper began then? A. Yes.

"Q. Why have you not produced all of them? Have you any objection to their all going in?

"Mr. DAVIS: I do not know that we have, but I have not seen the others back of these. I do not suppose there will be any objection.

"Mr. HOGAN: With your Honor's permission, so that we will have no misconception on the subject, I will say to Mr. Darlington that the file of the papers began March 21 because with that day the Warner articles began. The file of papers ends with April 4 because on that day the last Warner article appeared.

"Mr. DARLINGTON: I understand.

"Mr. HOGAN: We were trying to get in all the articles that were referred to in the Warner contract.

"Mr. DARLINGTON: Counsel has stated that the atmosphere surrounding this agitation is a part of this case. I submit that the other articles published at that time, back as far as March 6, make a part of that atmosphere.

By Mr. DARLINGTON (addressing the witness):

"Mr. Cain, can you produce copies of the Herald of March 6, March 8, March 10, March 11 and March 12? A. Yes, sir.
Mr. DARLINGTON: I will ask the witness to produce those copies time today or Monday."

And thereupon, at a later stage of the trial, the following ocred:

By Mr. DARLINGTON:

Q. Mr. Cain, you have produced the additional copies of the rald which I asked for? A. I have, sir.
Q. You have the Herald of March 7, 10, 11 and 12, have you? Yes sir.
Q. And also the Herald of March 14, 16, 21, 23, 24 and 25? Yes sir; and 26 and 27, and of April 1st, 2nd, 3rd and 4th.
Mr. DARLINGTON: Do you agree that the stenographer may mark e copies for identification?
Mr. DAVIS: You may consider them as severally identified by r dates."

hereupon, to further maintain the issues upon his part joined, plaintiff offered testimony tending to prove that, on April 12, , an indictment had been returned against one William Davis, rging that he had violated Section 865 of the Code of Laws of District of Columbia; that, on November 11, 1905, the said s had been convicted after trial before Mr. Justice Stafford, and an appeal taken to the Court of Appeals of the District of Columbia; and that, on January 28, 1908, two indictments had been returned against one John Walters charging him a violation of the said Section of the Code, to which demurrers filed by him on February 8, 1908, which were argued on uary 10, 1908, by the plaintiff and his assistant Mr. McNamara the Government, which demurrers were sustained on March by Justice Stafford, who filed a written opinion in the case, an appeal to the Court of Appeals noted, on behalf of the Govent, on March 13, 1908; that the bill of exceptions in the Davis had been signed on May 24, 1905; and that the appeals in both were dismissed in the fall of 1908, after the law had been passed ding the section of the Code in question by striking out the mile thereby rendering the questions involved in the cases unim-ant. It was conceded that there was a public agitation in the ict of Columbia commencing early in March, 1908, and extendntil after the middle of April, 1908, against permitting bookrs to operate at the Benning race track, and that public offiprivate citizens, and the press, were insisting that the plaintiff, ited States District Attorney, should institute further prosecuagainst gambling at the race track; and that the article com-ed of in plaintiff's declaration was published by the defendant this public agitation was going on.
reupon, further to maintain the issues upon his part joined, aintiff, as a witness on his own behalf, gave testimony tending

to prove that he is 42 years of age, a member of the Bar
29 Supreme Court of the District of Columbia, the Sta
Maryland, and the Supreme Court of the United States
has been such for some 16 or 17 years; that for about 10 yea
has been one of the lecturers of the Georgetown Law School; th
is now and since the first of September, 1905, has been United S
Attorney for the District of Columbia; that prior to that time,
1898, he was Assistant United States District Attorney for abo
months; and that in 1895, when he held the position of Ass
United States District Attorney for the District of Columbi
took part in a prosecution before the Police Court of the Stewa
the Washington Jockey Club who were charged with setting
gaming table, which prosecution resulted in a mis-trial, and wa
further prosecuted because of the decision of Mr. Justice Bradl
the Klein case; that, in this case of the Stewards, the plaintiff
relied on the decision of the Court of Appeals in Miller vs. U
States, 6 D. C. App., p. 1.

The plaintiff further testified that, during the time he had
the position of United States District Attorney, there had al
been some agitation about alleged illegal gaming at the race t
which became somewhat marked in the fall of 1906; that he
eluded the agitators were possibly entitled to another decision
withstanding the Klein case, and he prepared to proceed in the s
of 1905; that he was at first disposed to make a raid, but was
suaded from doing so by some of the persons interested in the Jo
Club and, also, by some of the assistants in his office,
30 stated that the Jockey Club had been running races regu
throughout the administrations of several of the District
torneys, and one of his assistants differed with him, thinking
Klein case was the law, and that they ought to let it stand;
plaintiff thought otherwise, but had a conference with Mr.
who represented the Jockey Club, telling him plaintiff had concl
that the point in the Klein case that there was no *locus* or p
where there was a setting up or having a place for gaming was
well taken, and that the matter should be tested again; that he th
upon sent a deputy marshal and two of his assistants to the race tr
that Mr. Ross offered to furnish all the paraphernalia used,
witness, instead of making a raid, followed the course his predece
had followed in all these cases, that is, he made a test case, a b
maker named Davis being arrested and becoming the defendan
this case, his paraphernalia being brought before the grand j
and also exhibited in court, resulting in a conviction, and an ap
to the Court of Appeals; that the plaintiff immediately there
sent representatives to the track, who advised him that the sy
of betting had changed, and instead of having a fixed location,
bookmakers were moving around, that it was therefore merely bet
under Section 869 of the Code, which permitted betting or be
making outside of the mile limit, and that it was not the setting
of a gaming table; that the Davis case showed a man at Benni
with a slate and certain paraphernalia, consisting of stools, a c
box and a large sheet of paper called a bookmaker's sheet; he st

at a particular spot, and had a cashier and sheet-writer assist-
31 ing him; that the crowd would go up to these several men and lay a bet, when the number of the bettor's badge would be taken and put on the sheet, with the amount of money, and something to indicate the horse on which the bet was made. Each bookmaker had a special number and a special assignment to a particular place, where he was required to be found at all times, and where he was found after the races by those persons who had won. After the Davis case, they attempted not to have a place where they could be said to carry on betting; instead of standing still at a particular place, with their paraphernalia, they had a printed official program, with each race on it—"they moved around, the object being to get around the decision of Judge Stafford, which said that the jury must find a definite place where the man was carrying on the business of gaming."

The plaintiff further testified that the Davis conviction was on November 14, 1906, that the appeal was carried forward after a great many delays in getting up the bill of exceptions and owing to engagements of counsel; that the case came on for hearing in the Court of Appeals in October, 1907, was passed then, and again at the November term; that plaintiff, becoming convinced that it could be impossible to get a decision in that case which would be more than an affirmance of the law upon its particular facts, and because of the agitation, determined to get up another case to cover the changed mode of betting; that he tried to get evidence at the November, 1907, meet, in order to prepare indictments, but it was very difficult and he could not do so; that he told Mr. Ross that, because of the agitation by the religious and business inter-
2 ests, he would not make a mere test case, but would arrest some one at the beginning of the next meet unless a decision should be obtained before that time, because he had been criticized for making test cases; that he would proceed against them as though they were violating the law, and would take strong action notwithstanding the Klein case, which he concluded had been overruled in the Davis case; that he conferred with the attorney for the Jockey Club, and it was arranged that they would give the facts exactly as they were, that he should cause an indictment to be found, they would try the case and then take it to the Court of Appeals, the indictment being so prepared that they could demur to it; that the evidence and facts presented to the grand jury were in accordance with the new method, namely: "the layer of odds", as they called the bookmaker after the Davis case, walked around and took bets, which plaintiff considered in substance though not in form a violation of the statute; that plaintiff prepared an indictment against Walters, one of the bookmakers, containing six counts, describing every phase of gambling as then carried on, and prepared another indictment at the suggestion of the attorneys for the Jockey Club, describing the bookmakers as being without the assistance of any person, and describing a man laying bets with divers persons; that, at the hearing on the demurrers, plaintiff argued that the bookmakers were doing exactly what they were doing before and were

within the spirit of the law; that the court raised the point that
charge in the indictment that the defendant made bets or wa
with "divers persons", might mean one or more persons, and
peared inclined to think that the case would have to g
33 on that point, whereupon plaintiff told the attorneys of
Jockey Club that, if the demurrers went off on that p
he would have to file other indictments, alleging gaming with a l
number of persons; that Justice Stafford, when he came to de
the case, did not decide it upon that point at all, or refer to
plaintiff remembers.

The plaintiff thereupon further testified that, after the actio
Justice Stafford in sustaining the demurrers, he took an appea
the Court of Appeals, which stood until Congress amended the
by striking out the one-mile limit, and made it unnecessary for
Court of Appeals to determine the question involved in that cas
the Davis case; that, after the decision of Judge Stafford,
plaintiff was urged to make further prosecutions for betting at
track, under the same conditions, but refused to do it, on the gro
that he was bound by the decision of Justice Stafford until the C
of Appeals reversed that decision—that it put him in a posi
where he had no right to arrest anybody for betting at the r
track; "that he could not have done it under the law, which he
sworn to uphold and not defeat; and his reply to all request
make arrests, after the decision by Judge Stafford, was that he
bound by that decision, until the Court of Appeals reversed
decision, which put him in a position where he had no right to a
anybody for betting at the race track; that he might as well h
arrested a person for playing croquet in his back yard."

Thereupon the plaintiff further testified that, in declining
bring further prosecutions in relation to betting at the r
34 track, he was not actuated by any other motive than t
stated; that he often had applications for warrants for g
ing at other places than the race track; that certain persons wis
to close up the Masonic Fair on account of a wheel they had th
and for voting for certain articles; that there were frequent ap
cations for warrants under these gaming statutes, and that plain
exercised his discretion in these cases, as he does every day in ca
refusing the warrants.

The plaintiff further testified that in the spring of 1908, there
quite a spirited political contest in Montgomery County, Maryla
where plaintiff resided, with reference to the election of a represe
tive to Congress from the Sixth Congressional District, among
contestants being Col. Pearre, the incumbent, and the defendant
this case; that plaintiff supported Col. Pearre, and did everyth
that he could in a proper way to aid him in carrying Montgom
County, but that he had no assistance of any kind from any
connected, directly or remotely, with the race track, to plaint
knowledge, and that no person so connected had in any way ai
by the giving of any money towards the campaign fund which
gotten up in aid of Col. Pearre's candidacy; that the defendan
advertisement in the Washington Herald of March 28, 1908, w

called to plaintiff's attention by Mr. Justice Gould the morning of its publication; that the statement in it that, on the Saturday preceding its publication, a Justice of the Supreme Court of the District of Columbia and plaintiff went to Rockville to attend a conference of the defendant's enemies and to determine what ammunition was needed to defeat him was not true as stated in said advertisement; it is true that plaintiff went to Rockville with Judge Gould that day to meet many representative people of Montgomery County, but not to attend a conference to determine what ammunition was needed to defeat defendant; that plaintiff was a member of the county committee, a meeting of which was called at Rockville in regard to the names of the judges and the places where the primaries were to be held, and plaintiff and Judge Gould went out together to attend that meeting, and they met certain representative people of Montgomery County who had been invited to be there that day, after the meeting of the county committee, to talk over the prospects in the County for Pearre and exactly what was doing; that, after the county committee meeting, all in favor of Col. Pearre were asked to remain, and they talked over his chances, the matter of getting funds, and whether it was necessary to get up a campaign fund, as it was represented that the County had been flooded with money of the defendant, that certain colored politicians had been purchased and that it would possibly be necessary to take steps to overcome this ticket; that they discussed the question how the defendant could be defeated, and that is what the plaintiff went there for; they also talked over the candidacy of Mr. Blair for the position of delegate at the Republican National Convention, and something may have been said in a general way in the county committee that they would have to get up some kind of a campaign fund, though he does not think anything was said about finances at that meeting; that he also saw the publication in the Herald of March 30th; that the agitation about betting at the race track was going on just prior to and during the 1908 spring meet of the Washington Jockey Club, which took place in the latter part of March and ran up until nearly the middle of April, all of which was known to plaintiff; that, after the Walters decision, he had an official request from the Commissioners of the District of Columbia in reference to further prosecutions; that a couple of detectives and policemen called on him from the Chief of Police in reference to the same matter, and that there was some agitation as to the rest of the bookmakers, or the stewards of the Jockey Club, on the charge of permitting a gaming-table to be set up, but Judge Stafford's decision tied plaintiff's hands and he could not and did not do anything, solely because of the situation developed in the trial of the Walters case.

On cross-examination, the plaintiff testified that the point decided by Judge Bradley in the Klein case was that there was no *locus*, or place, where the man who carried on gambling set up a gaming table in connection with these gambling operations, as was necessary under the statute; that this was virtually the same proposition passed on by Judge Stafford in the Davis case; that, in his opinion, the

point in the Klein case was not well taken, and this was why he brought the other case; that he is aware a section of the Code provided that its provisions against gaming should be liberally construed and that he had argued that proposition until he was "black in the face"; that the object of the statute was to prevent the business of gambling, and his argument before Mr. Justice Staf-
37 ford was that the object was not simply to prevent gambling in any particular spot; that he had argued to Judge Stafford that he should look to the substance and not to the form, that if a man was standing there, taking bets from a number of persons, and making it a business to bet, it should be considered a violation of the statute, taking into consideration that section that it should be construed liberally, but that Justice Stafford had not agreed with him; that plaintiff did not think that the statute meant an actual table, with four legs,—that was decided in the Miller case, as plaintiff understands it; that plaintiff thought, until Judge Stafford decided the Walters case, that the statute to prevent the business of gambling should not be refined away by saying that you could not stand in one particular spot and gamble, but that you could walk around and gamble, but, after reading Judge Stafford's opinion, plaintiff had some doubt; a good deal of doubt, whether he could reverse on appeal; that he knew what was going on at the 1907 fall meet through reports from his assistants, policemen, detectives and agitators; that there was no difficulty in getting evidence as to what was going on there at the 1908 meet after Judge Stafford's decision; "there was no trouble at all about that, but what was going on was not a violation of the law, according to this decision; that the bookmaker moved about in the yard in front of the grand-stand and the shed adjoining thereto, exhibiting a program on which the odds were displayed, exactly the same thing they did in the Walters case, offering to take, and taking bets and wagers from the persons
38 then present on the premises, making a report of the bets taken upon a memorandum kept by him, being accompanied by one employee who made a record of the bets, and another who received all moneys deposited as bets by the persons making them with the bookmaker, the bets being paid by these employees after the race was over according to the record so made, their payment being marked on said record.

Thereupon the plaintiff, taking the Walters indictment, said: "Here is the condition that existed in the Walters case, and the condition which I was advised still existed during the Spring meet, and it is the way I looked at the case, from the standpoint of the Government"; thereupon, the witness read in the indictment in the Walters case the following:

"That said John Walters did move about in said yard in front of and in said place under said grand-stand, and in said shed adjoining thereto, exhibiting a program on which certain odds were displayed, and did then and there, and before the running of said races, offer to take and did take, from divers persons then present on said premises, divers bets and wagers upon the said races then and there being conducted, according to the odds so exhibited, which

odds might be changed from time to time during the course of receiving bets upon the particular race, and the said John Walters did then and there receive said bets, and at the time of receiving the same did then and there make a record thereof upon memoranda kept by him, and on the days last aforesaid, and while the said John Walters did so move about as aforesaid, he was accompanied by certain employees, and that one of the said employees
39 did then and there, at the direction of the said Walters, make a record of all bets made by him, the said John Walters, and another of the said employees did then and there, at the direction of the said John Walters, receive all money deposited as bets by those persons who so bet with the said John Walters, and both of the said last mentioned employees did then and there, and at the direction of the said John Walters, and after the said races were run, pay out money, according to the said record made as aforesaid, to those persons so betting with the said John Walters who had won, and did mark such payment on said record, against the form of the statute in such case made and provided."

The plaintiff further testified that, in the case of Miller vs. United States, the Court of Appeals had said: "It requires but a casual reading of the several acts of Congress to perceive that the latter acts had for their object the prohibition and punishment of an offense quite different from that contemplated by the act of 1883. The Act of 1883 had for its object, as we have before stated, the suppression of gaming tables and places set up and kept for gambling, and to which all persons are invited to resort for the purpose of gaming;" that, in the Miller case, the Court of Appeals had said that, in order to have a gaming table, you do not have to have an actual table, but must have a game connected at a certain place; also, that the Act of 1885, under which he had proceeded in the Walters case, had for its object the suppression of gaming tables and all places set up and kept for gambling to which all persons were invited to resort for that purpose—either the one or the
49 other; and that, in the indictment, they had charged "places" and "gaming table", that, in the Walters case, Judge Stafford had held that there was not sufficient to go to the jury on the question of setting up a gaming table; that the only question was whether the man had a place for gaming, and that there was no gaming table set up within the meaning of the Miller case; that, in the Miller case, the court had held that the act of 1885 was to prevent the setting up and keeping of gaming tables or places—"If you set up a gaming table you violate the statute, and if you set up a place you violate it"—either the one or the other.

Plaintiff further testified that, in the Davis case, Judge Stafford instructed the jury that if, at the Benning Race Track, there was a contest or running race of horses, and if the defendant "did set up and keep a certain gaming table, that is to say, at said race track aforesaid carry on a gaming device or contrivance called bookmaking on a horse race about to be run", then the defendant was guilty as charged in the indictment. In sustaining the demurrers in the Walters case, the opinion of Mr. Justice Stafford

stated: "But, as already observed, the present indictments do not charge that the bookmaking was carried on as a business, and if that is, indeed, the very fact that changes lawful bookmaking into unlawful bookmaking, as the Government contends, it ought surely to be alleged, and alleged with positiveness and distinctness," and the opinion further stated, in reference to the Walters indictments: "Neither of these counts charges anything more than divers acts of bookmaking in the territory where it is conceded that
41 bookmaking, pure and simple, is lawful. Hence they are insufficient." And, further: "None of the counts charge expressly that the defendant was carrying on bookmaking as a business. They charge that he offered to take, and did take, bets from divers persons, that he exhibited a program on which were displayed the odds he was offering. The exhibiting and the offering are alleged to have been made to divers persons, which would be satisfied by proof of two or more, such being the definition of 'divers'"; but, upon the opinion as a whole, Judge Stafford said that, under the facts as stated in the indictment, which were the facts as they existed at the race track, there could be no prosecution, and therefore the plaintiff claimed his hands were tied; that in the same opinion Judge Stafford says:

"If Section 865 had been held to apply only to tangible devices and contrivances, a plain broad line of distinction would have existed between the offense made punishable by that section and the offense made punishable by Section 869; but when the Court of Appeals in the Miller case rejected that interpretation of Section 865, and treated the section as applicable to a mere method of betting, such as bookmaking is, it is not to be wondered at that the distinction between the setting up a method of betting on the one hand and using that method on the other hand should be found to be somewhat metaphysical and difficult to apply. With every wish to follow the decision in the Miller case I have not been able to hold any of the counts in either of the indictments in the present cases sufficient. In neither one is a state of facts set forth
42 that shows anything more than bookmaking as it must have been understood by Congress when Section 869 was enacted. And by that section Congress prohibited bookmaking only in the cities of Washington and Georgetown and within one mile thereof. When Congress wishes to change the law it can do so without any assistance from the courts. The responsibility rests with Congress. As a citizen I should be glad to see a stop put to all gambling, but as a judge I must follow the statute and give it a fair and reasonable interpretation." Then, bearing in mind what you have read, after this agitation I went to see Mr. Justice Stafford and I took this opinion and called his attention to exactly what was to be done thereunder. I called his attention to the same things you refer to, and had a lengthy conversation with him and he said "The whole matter rests with Congress, let Congress act. You have done your duty;" that the decision of Justice Bradley in the Klein case was a decision by a judge of equal official rank with the decision of Justice Stafford in the Walters case; that the decision of Judge

adley did not tie his hands so that he could not prosecute, because was years old, there was much dispute among members of the r whether the Miller case was law, Judge Bradley intimating in opinion that it was not law, while a great many people thought Klein case was improperly decided. A qualified right of appeal d been given the Government since the Klein case; there was ne inconsistency between the Miller case and the Klein case, and determined to have the question tried again; that he considered Judge Bradley's decision in the Klein case was so far binding that plaintiff should not make a raid or anything of that kind, but not so far binding as that he could not bring a test case; and that he did not consider the fact that the ris had decided the case was not a reason why he should not g another test case.

The plaintiff further testified on cross-examination that, in his f before the Court of Appeals in the Davis case, he had argued question of law whether the statute did not prohibit book- ing; that at the time the brief was printed, he thought there enough in the case to have the question of the gambling stat- construed by the Court of Appeals, and he thinks he argued in his brief, but is not sure about it; that he did not despair aving a construction of this provision by the Court of Appeals he Davis case—the word "despair" is too strong;—that, in his , he cited the case of Thrower vs. the State, 117 Ga., 753, to the that there is a difference, in the question of criminality, be- n public betting as a business and mere private betting be- n individuals; that plaintiff was mistaken in his direct testi- y, in stating that Judge Stafford, in deciding the demurrers in Walters case, had not referred to the meaning of the word ers," but the opinion further on stated that there was no of- charged under the law, and that bookmaking beyond the limit was not an offense under Section 865; that, with respect at part of the opinion which stated that the Walters indict- s "do not charge that the bookmaking was carried on as a ess, and if that is, indeed, the very fact that changes lawful bookmaking into unlawful bookmaking, as the Government contends, it surely ought to be alleged, and alleged with positiveness and distinctness," the plaintiff thought he had his indictment as plain as it could be, and, though the court ot agree with him, he had taken an appeal from the court's on.

intiff further testified that he did not think, until Judge rd's decision, that the bookmakers had avoided violating the ith regard to gambling by moving around, instead of stand- one place, but that his assistant, Mr. Given, had thought so. dvised plaintiff against bringing another case; that the new as passed April 15, 1908, and had been pending during all gitation, when these Herald articles were being published; the reasons that he could not get evidence at the November was that he did not try, and this was because they had ed their mode of betting; that he communicated with Mr.

Ross in these cases because he represented the Jockey Club and plaintiff's predecessors had done likewise; that he did not stop the meet because these men had invested hundreds of thousands of dollars, had been carrying on this same sort of thing before plaintiff had been admitted to the Bar, because his predecessors had refused to make raids, and every case tried had been a test case; that he did not know where the bookmakers came from, though he knew one or two of them, and never gave it a thought whether they were residents or non-residents, or whether they followed the horses around; that after the Walters case he refused the request of the Commissioners of the District of Columbia to prosecute; that he does not know whether the Rev. Mr. Crafts called on him about prosecutions or called his attention to the fact
15 that Judge Stafford had intimated that the indictments were defective in that the carrying on of bookmaking as a business was not alleged in them, but, if so, plaintiff declined to prosecute and contradicted him; that he knew the press was pointing out that Judge Stafford had so intimated; that he thinks he read the Herald editorial of March 12, on page 6, as it did not state what Judge Stafford had said, he paid no attention to it, and the editorial is not true; that his sense told him he would have to charge the carrying on of bookmaking as a business, and give the details, and his sense told him he could charge in the indictments what the Judge said he had not charged, namely, that the bookmakers were inviting bets from everybody, but Judge Stafford seemed to think this would make no difference.

Thereupon, counsel for the defendant handed plaintiff copy of the Washington Herald of March 21 and called his attention to an editorial therein, this copy of the Herald being published on the Saturday preceding March 28, the day when the article in suit was published; plaintiff being asked if he had ever read said editorial, answered that he did not remember ever having seen it before; whereupon, counsel for the defendant commenced to read from said editorial, to which counsel for the plaintiff objected, and the following occurred:

"Mr. DAVIS: Why should this be read now? The witness says he has not read it.

"The COURT: He says he does not remember ever having seen it before.
16 Mr. DARLINGTON: My friends began this case with a stipulation that everything in the papers affecting the race-track gambling should go in evidence, as we want it in, showing the atmosphere of the case, and now they object to this.

"Mr. DAVIS: Oh, no. It will be proper for me to advert to the extent of the understanding, to what was contemplated to be put in evidence. That is not the point. The witness has said that he does not remember that article. Therefore it could not have made any atmosphere for him.

"The COURT: I do not understand Mr. Darlington is pressing it.

"Mr DARLINGTON: No."

The plaintiff further testified on cross-examination that there is a district committee in each district of Montgomery County, the

chairman of which district committees constitute the county committee; that he could not name all the members of the latter committee; that on March 21, the talk about getting funds and the chances of Pearre took place after the meeting, when several persons talked about whether a campaign fund would be necessary, what amount, where it should be placed and everything of that kind; that, after the meeting, he talked with one or two people about a campaign fund; they discussed whether they should put up a campaign fund to meet that of the defendant; they did not have all the campaign fund ammunition. He does not remember Horace Sedgewick, a colored politician, replying in answer to a question by plaintiff that his district was pro-Warner, but might be carried for Pearre with money and whiskey, he will say that Sedgewick did not say that to him. Sedgewick might have said that the defendant had money and whiskey there, and that it would take something to overcome that, but does not think he said money and whiskey, and plaintiff did not ask him what that something was or what it referred to; that he is pretty sure he did not speak to Sedgewick about it; that he saw J. T. Purdum there, but didn't see any money change hands for use in the campaign; that they decided to make a fight in Montgomery County, though some thought it a forlorn hope; thinks determined that some money was needed for the campaign, and that they would get up a small fund, "because you can't carry on a campaign without having money"; that plaintiff personally agreed to put up some money for certain districts and did so; that he asked representatives from different districts how the situation looked, but does not know that some said money would be necessary, and his memory is that no one said at the meeting that his district could be carried with money, though in the after-talk that might have been said; that he has been trying to decide whether he was present at the conference between Purdum and Mr. Blair on that occasion, that he does not remember whether Mr. Purdum said it would take $100 to carry his district, and whether plaintiff asked him whether $50 then and $50 later would do, but he may have done so, and he does not remember whether Mr. Blair paid him $50, then, or whether plaintiff said to Mr. Blair to give him $50, then and $50, later.

On re-direct examination the plaintiff testified that you could not indict a man for carrying on a business, but would have to set out and describe all the facts in the indictment, which is exactly what he did in the Walters case; that his visit to Rockville was on Saturday afternoon, March 21st, a legal holiday; that it would have been impossible to have taken action because the race had not begun and there was nothing to prosecute; that the spring meet at the race track began Monday, March 25; that when he read the article in suit, it had a very serious effect on him, he first became indignant, then very angry; that he knew all the circumstances, as soon as he read it, under which it was published; he knew that there was an attempt to deprive him of his office; that saw that his character was impugned; he was charged with a fraud, and with debasing his office; that he be-

lieved he was charged with a crime, that is, malfeasance in
that he suffered from distress of mind; that when he read the a
over he naturally thought "What will people think of me?" a
that way he was very much distressed, went a step further,
thought "What will my superiors think of me if the matter is
lished here in the District of Columbia?"

On cross-examination, the plaintiff testified that he might
framed a new indictment, charging bookmaking with "any
all persons", but Judge Stafford said that would not make
difference in his opinion; that before the Rockville meeting
was aware of one or two editorials to the effect that the agitators
not consider the case settled by the Walters decision; that he
fully considered the whole case before taking the Saturday a
noon's holiday, and determined that no law was violated.

Thereupon the following ensued:

"You say you felt your character was impugned, yo
49 lieved that you were being charged with malfeasance in o
that you did not know what your friends and others w
think of you. Did you call upon the defendant to explai
retract? A. No, no, Mr. Darlington; I knew the exact status o
defendant in this matter.

Q. That would have been the quickest way to relieve any
jurious suspicions in connection with the suggestion, would it
A. Not with the defendant, no."

Thereupon the counsel for the plaintiff read into the re
Sections 865 and 869 of the Code of Law of the District of Colum
as follows:

"SEC. 865. Gaming. Whoever shall in the District set up
keep any gaming table, or any house, vessel, or place, on lan
water, for the purpose of gaming, or gambling device comm
called A B C, faro bank, E O, roulette, equality, keno, thimble
little joker, or any kind of gaming table or gambling device actu
devised, and designed for the purpose of playing any game of cha
for money or property, or shall induce, entice, and permit any pe
to bet or play at or upon any such gaming table or gambling dev
or on the side of or against the keeper thereof, shall be punished
imprisonment for a term of not more than five years."

"SEC. 869. Pool Selling, and so Forth.—It shall be unlawful
any person or association of persons in the cities of Washington
Georgetown, in the District of Columbia, or within
50 District within one mile of the boundaries of said cities
bet, gamble, or make books or pools on the result of
trotting race or running race of horses, or boat races, or race of
kind, or on any election or any contest of any kind, or game
baseball. Any person or association of persons violating the p
visions of this section shall be fined not exceeding five hund
dollars or be imprisoned not more than ninety days, or both."

Thereupon counsel for the plaintiff read the charge of Mr. Ju
Stafford to the jury in the Davis case as follows:

"The charge here is that on the 11th day of April, in the pres
year, there was at certain premises in the District commonly kno

and called the Bennings Race Track, a certain event or contest called a running race of horses, and that on the same day on the said premises, the defendant did set up and keep a certain gaming table,—that is to say, a game, device and contrivance called bookmaking on the race aforesaid, the said game, device and contrivance being then and there a game, device and contrivance at which money was then and there, and before the said race took place, bet and wagered by divers persons then and there present upon the result of the said race and which said game, device and contrivance called bookmaking on the said race was then and there a gambling device, adapted, devised and designed for the purpose of playing a game of chance for money against the form of the statute, etc.

"In this case there is evidence tending to show that on the day stated, there were certain premises called the Bennings race track, and upon these premises a certain event or contest called a running race of horses. There is evidence tending to show that on that date and in that place the defendant was engaged in a transaction which some of the witnesses have called bookmaking. There is evidence tending to show then that he was then and there engaged in bookmaking. There is evidence tending to show that he had a card or slate upon and by which he exhibited to the public the odds which he was willing to give upon certain horses, or upon certain horses in the race that he was exhibiting that card or slate to the public, and offering to make those bets. There is evidence tending to show that he had a sheet and a writer to keep upon that sheet a record of the bets which were taken in such a way that after the contest was over the bet could be identified. There is evidence tending to show that the bettor was told the number of his bet, so that after the contest was over, if he had won, he could return and identify his bet by the record, or have it identified, and claim and secure his winnings. I say the evidence tends to show that. It tends to show that he had there a box in which the money was received and placed the money which the bettors passed in,—and had a cashier in charge of it. It tends to show that he had a few stools grouped together where he was carrying on this business with the public. It tends to show that he had a number which had been assigned to him by the Secretary of an organization of layers of odds to which he belonged, and that by virtue of that assignment, he occupied for that day, a place corresponding to the number which had been assigned to him. The evidence tends to show that there was there in that place, a ring of such layers of odds, members of the organization to which he belonged, some fifty of them, I believe, and that each had his number and occupied a place corresponding to his number.

"The evidence tends to show that this business of bookmaking was conducted by the defendant according to such a system that if one came and laid a bet with him, there would be a record of the bet made, there would be a number by which the bet and the bettor could be identified, and after the contest if the bettor won, he could identify his bet by that number and the record, and claim his winnings. The evidence tends to show that the defendant occupied a place on that day sufficiently definite on that day to enable better-

to find him, to know where he was to be found, and to return to him after the contest and claim their winnings of him. The evidence tends to show that there was no substantial change in the position he occupied during the day in question.

"If you find all those facts established, which I just said the evidence tends to show, if you find them all established beyond a reasonable doubt, you would be justified in finding therefrom that he was then and there setting up and keeping a gaming table or a gaming device, because it has been held by the Court of Appeals in this District, that bookmaking so conducted and carried on is a gambling device, or a gaming table within the meaning of the statute. But it is necessary that you should find all those facts established in order to find that the defendant did set up and keep
a gaming table or a gambling device, that is to say, bookmak-
53 ing, as charged in the indictment.

"Then, beyond that, you must find that divers persons did, on the date named, resort to him at this place, and carry on this business with him, and did lay bets with him. That is charged in the indictment, and is part of the charge. The evidence tends to show that divers persons did those things with him, on that day at that place. It is necessary that you should find that the bet was wagered on the contest or event which was then going on, because that is what is charged here. No question, I think, has been made in regard to that.

"It is charged here that this transaction or business that was going on, was commonly called bookmaking. That is one of the charges here, and there is evidence tending to show that such was the fact. That is one of the facts to be found by you.

"It is also alleged that this betting in the way I have stated took place between the defendant and divers persons present at the place stated and before the contest, the running took place. There is evidence tending to show that, and that is to be found by you as one of the essential facts in the case.

"In view of what has been stated by the counsel for the defendant, it may seem strange to you, that I give some of these requests for prayers, but I do it in order to keep the record straight.

"I charge you, as requested, that the jury are entitled to consider
all the evidence, and they are the sole judges of the facts.
54 "I charge you, as requested, secondly, that the jury must not consider any remarks of the court in connection with the motion to dismiss as in any way determining the question of facts, or as an intimation of any view upon the facts that he considers the jury must take.

"I charge you, as requested in their third request, that the making of a bet upon a horse-race does not constitute the setting up of a gaming table.

"I charge you, as requested, by their fourth request, that the mere making of a number of bets upon a horse-race does not constitute the setting up of a gaming table.

"And according to their fifth request, it is immaterial whether the bets made, be upon any horse or horses, or against a horse or horses.

And as requested by their fourth request, some forms of book-
ing may be carried on under such circumstances as not to con-
te the setting up of a gaming table. Bookmaking may also be
ied on under such forms or with such accompaniments as to
titute a gaming table.

And as requested by their eleventh request, the mere act of book-
ing is not necessarily the setting up of a gaming table.

As I understand it, the essential of the offense of setting up a
ing table, to wit, bookmaking, is that the bookmaking should
e conducted as that the bookmaker is offering the public to
e bets with them at certain odds which are exhibited to them on a
card or slate or some such means and is offering to have a
record made of such bets so as to identify the bet and the
bettor, in order that, if he wins, he may return and get his
ings; and that such a record shall be kept and is being kept, and
in doing that business he is occupying some certain place, such
he is identified with it, and may readily be found by the persons
have occasion to do business with him, especially by those who
laid bets with him before the contest, and wish to return and
their winnings afterwards. It is necessary that he should be oc-
ing the same place for that purpose. If he is conducting that
of a business in that way, at such a place, he is setting up a
ng table—that is to say, bookmaking—in that place. That
essential element of the charge of setting up a gaming table,
is to say, bookmaking, as charged in the indictment; and all
elements you must find established beyond a reasonable doubt."

ereupon counsel for the plaintiff read in evidence the opinion
Court in the Walters case, as follows:

Opinion of the Court.

Filed in Open Court Mar. 11, 1908. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 25928. No. 25929. Criminal.

UNITED STATES
vs.
JOHN WALTERS.

se are two indictments for supposed offenses against the gam-
law. The defendant has demurred to each and every count,
and the question, as to each count, is whether it sets forth
facts which constitute an offense. All are aimed at book-
making. Some of the counts attempt to charge it as the set-
p and keeping of a gaming table; others attempt to charge the
ng of a place for gaming, that is, a place where bookmaking
ied on,—all the counts being drawn upon section 865 of the
f Law for the District of Columbia, which makes it a crime
up or keep any gaming table or any house, vessel or place on
r water for the purpose of gaming," or to set up or keep the

"gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimble, or little joker, or any kind of gaming table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property," or to "induce, entice and permit any person to bet or play at or upon any such gaming table or gambling device, or (either) on the side of or against the keeper thereof."

Section 866 provides a penalty for permitting any gaming table, bank, or device to be set up or used for the purpose of gaming in any house, building, vessel, shed, booth, shelter, lot or other premises.

Section 868 declares that "all games, devices or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of these sections."

All of these sections apply to the whole District of Columbia. But then follows another section, 869, which applies only to a portion of said District, viz., the cities of Washington and Georgetown and the territory within a mile of the boundaries thereof. This
57 section makes it unlawful to bet, gamble or make books or pools on the result of any race, contest, election &c, and provides, for so doing, a different and lighter penalty from that provided by the previous sections.

All of the offenses attempted to be charged in these indictments are alleged to have been committed two miles from the boundaries of said cities, that is to say, in territory to which the last named section (869) does not apply. Which is the same thing as to say that as to what may be called the inside territory the statute prohibits the making of books, in so many words; while in the outside territory it does not. The natural inference is that the mere making of books is not unlawful in the out-side territory, where the things complained of were done. And indeed the Government concedes this but it contends that the mere making of books is one thing and the keeping of a place for bookmaking, or the setting up and keeping of bookmaking, is another. The distinction was made and applied in the principal case upon the subject, Miller vs. U. S., 6 App. D. C.

6. That case, like this, was heard upon demurrer. There were two counts. The first charged the setting up and keeping of a certain gaming table, to wit, the game, device and contrivance called bookmaking on a certain race, and alleged that said game, device and contrivance was one at which money was wagered by divers persons on a race then and there taking place. The second charged the setting up and keeping of a place for the purpose of gaming, to wit, a booth, with the usual averments as to the gathering of evil disposed persons to gamble on the game, device and contrivance
58 called bookmaking in the first count mentioned. The offense was alleged in each count to have been committed in the outside territory. The demurrer was general, but the court considered each count and adjudged each to be sufficient.

In that case the Court recognized the fact that the bookmaking pure and simple was not prohibited in the outside territory, but declared that if it was "set up and kept" as a game, device and con-

trivance at which money was wagered the setting up and keeping was an offense everywhere in the District by force of section 865; and the demurrer admitting that bookmaking was such a game, device and contrivance, and that it was set up and kept, that was enough. Even more clearly was the second count good, which charged the keeping of a place for gambling and bookmaking.

In the present case, each count attempts to state specifically the facts which, according to the Government's claim, amount to the setting up and keeping of a gaming table, or the keeping of a place for gaming; differing in this respect from the general form of allegation employed in the indictment in the Miller case. For example, in the first count of the first indictment now before us it is charged that the defendant did set up and keep a gaming table "in that he did move about in" a large space "theretofore described and did "offer to take and did take from divers persons then present divers bets and wagers upon the said races" * * * "according to the odds offered by him which said odds might be changed from time to time" * * * "and did then and there receive said bets and at the time of receiving the same did make a record thereof,
59 being the form of betting commonly known as bookmaking."

Consequently the question presented by this count is whether the specific acts charged necessarily amount to setting up and keeping a gaming table.

It was argued in the Miller case that a gaming table must necessarily be a physical thing which could be literally set up and kept and played upon and could not be a mere method of betting upon some disconnected thing like a horse race. But the argument was rejected and it was distinctly declared that the expression as defined by the statute did not involve the ordinary mechanical definition of a table, but that it was enough if it was a game, device or contrivance at which money was bet and wagered. The first count in that case did not state specifically the facts which constituted the setting up and keeping of bookmaking as a gaming table. It only alleged that it was such a game, device and contrivance and that it was set up and kept. Consequently if it could be set up and kept the indictment was good, and whether it was in fact set up and kept was to be determined when the evidence should be offered. In that case the court also held, as many other courts have held, that a horse race is a game. So the sum and substance of the decision was that the making of books upon a horse race might be a game, device or contrivance upon which money was wagered and that it might be set up and kept and that inasmuch as the indictment charged that it was so in fact, it was sufficient on demurrer.

The Miller case was decided in 1895. The next case in
60 which the statute came prominently before the courts was the case of Klein, tried and decided in this Court, before Justice Bradley and a jury, in 1899. At the close of the Government's testimony the defendant moved for a verdict and the motion was finally granted. The case there presented was thus summarized by the Justice:

"The testimony tends to show that about this date, or several days either before or subsequent thereto, there was a game or contest

carried on at Bennings race track which was called a horse race, for running horses; that Bennings race track is located more than a mile outside of the limits of the cities of Washington and Georgetown, within the District of Columbia, and that on or about the 14th day of November, the defendant, a race being in progress on this track, was present and within an enclosure which was called by the witnesses a betting-ring, in which there were eighteen or nineteen other persons engaged as was the defendant; that the defendant was the last or the next to the last man on the left-hand side, as the witnesses describe this enclosure, the other eighteen or nineteen men similarly engaged being either in the line with him, or in a line that was nearer to the race track, this betting enclosure being within fifteen yards of the race track; that the defendant was standing upon an ordinary stool similar to a lunch counter stool, which elevated him two and one-half or three feet above the floor and that he was accompanied by two individuals as assistants or associates; that he held in his hand a program of the races of that day, and a slate or silicated cardboard on which were given the names of the horses that were backed
61 for the races of the day, and the odds that were offered; that the three witnesses who were examined bet upon some one or more of the races, putting up their money with the defendant; that the defendant, through his agent, took the number of the party making the bet, and this was entered upon a tablet or book kept by one of the men, and that the money being paid over went to the cashier. The question whether the party won or lost was determined by the result of the race in which the horses on which the bet was placed took part. That result was not announced by the defendant but was announced by the managers or timekeepers of the race. That if the party lost, as two of the witnesses did, he was notified of the fact by the published result of the races; he did not return to the defendant to see about his money, he was aware of the fact that his money was lost; that the bet he had made was a losing bet to him. If he won, as one of the witnesses testified that he did, he returned to the defendant's cashier and received his money.

One of these witnesses, who has followed the races for eight of ten years, and who has been engaged in various capacities in connection with races during that time, and was present on this occasion simply as a bettor, testified that all the acts in which the defendant was engaged at that time and place, were incidents of what is technically termed bookmaking, possibly excepting the occupying the seat of a stool with his feet."

The question was whether under this state of facts bookmaking was set up and kept; and it was held that it was not, for the reason that the defendant "did not have a specified place that was
62 his own place, in which he conducted his business. He did not have a booth or stand or platform or an enclosure that he could call his own place." The acts disclosed by the testimony were only bookmaking, which was not unlawful in the outside territory.

So the decisions rested until 1907, when the Davis case was tried in this Court. That was a general indictment like the one in the Miller case. There was a jury trial, and at the close of the Government's case the defendant moved for a verdict. I overruled the mo-

tion and submitted the case to the jury with instructions that if they found certain facts established which the evidence tended to show, they might return a verdict of guilty, which they did. The principal difference between that case and the Klein case was that in the Davis case the defendant did have a specified place that was, at least for the day in question, his own place, in which he conducted his business. He had a number and an assigned place in the ring of layers of odds corresponding to his number, where he remained throughout the racing day. He had there several stools grouped together, his cash book, his record sheet, his program sheet, his secretary and his cashier. Bettors received from him a number by which to identify their wager and returned to the place to claim their winnings. If a distinction was to be made between the mere making of books, which in that place was lawful, and the setting up and keeping of the making of books, it seemed to me that the testimony fairly showed a case within the latter class. At the same time I granted the defendant's requests to charge that the making of a bet
63 upon a horse race did not constitute the setting up of a gaming table; that the mere making of a number of bets upon a horse race did not constitute the setting up of a gaming table; that bookmaking was or was not the setting up of a gaming table according to the circumstances under which it was carried on.

In that case I required the jury to find all that the Government's evidence tended to prove. It was equivalent to holding that the Government's evidence, if believed, made a case. There was no conflict in the evidence. One fact was as well supported as another and there was no occasion to inquire whether a case showing only a part of those facts would have been sufficient. The case was dealt with as a practical question, not as a moot or academic question. Consequently, although I told the jury in that case that they must find all those facts which the government's evidence tended to prove, established beyond a reasonable doubt, I should not hesitate, in this case or any other, to decide that a portion of those facts or a variation from those facts would make a good case if on consideration they appeared to be sufficient.

In passing upon the several counts now before me the difficulty is to determine just how far one may go in the making of books without setting it up. The Government's contention is that it is set up when it is carried on generally and the public generally are invited to bet with the bookmaker. The embarrassment about adopting this view is that it does not seem to leave any real and substantial distinction between bookmaking and the setting up of book-
64 making. For, as I understand it, the mere making of books implies this very thing—a making of divers bets with divers persons according to stated odds offered generally by the maker of the book. It is not an individual act of betting. It is not the offer and acceptance of a bet even though a memorandum of that bet be made, that constitutes bookmaking, but the general offer and acceptance of the bets and the systematic recording of them. None of the counts charge expressly that the defendant was carrying on bookmaking as a business. They charge that he offered to take and did

take bets from divers persons, that he exhibited a program on wh
were displayed the odds he was offering. The exhibiting and
offering are alleged to have been to divers persons, which would
satisfied by proof of two or more, such being the definition
"divers." So far as the number of persons is concerned with wh
the defendant is alleged to have done business, it is not perceived h
he could have been making books at all without doing what is
leged, that is, without offering to several persons to make bets
stated odds and taking and recording their bets. Whether the c
would be changed at all by an allegation that he was doing t
with any and all persons who cared to bet need not perhaps be c
sidered, since it is not alleged. It would seem however to be
narrow position to take, that the law says, "You may make boo
but you must not make them with every body who comes alon
You may make books, and you may make them with more th
one person, but you must not make them generally." It would rath
seem that the distinction between the making of books, whi
65 is lawful, and the setting up of such making, which is u
lawful, if it is to be maintained at all, should be looked f
in such circumstances as those which were held to be determinati
in the Klein case and the Davis case. It may not be necessary
say that bookmaking cannot be set up except in a fixed and i
movable structure or place, that it might not be set up in a travelli
booth, nor even that such a moving structure might not be a "plac
within the meaning of the statute. But it does seem clear that the
must be something more tangible and substantial than the me
fact that bookmaking is going on even as a business. But, as alrea
observed, the present indictments do not charge that the bookmaki
was carried on as a business, and if that is, indeed, the very fa
that changes lawful bookmaking into unlawful bookmaking as th
Government contends, it ought, surely, to be alleged, and alleg
with positiveness and distinctness.

If, now, we examine the several counts, we find that the first cou
of the first indictment, which has been substantially stated at th
opening of this opinion, charges nothing more than the movin
about in a very large space, presumably occupied by crowds o
people, offering to make and taking from various people wagers upo
the races there about to be run and recording the bets as he receive
them—"being the form of betting commonly known as bookmak
ing." The second count in the same indictment is identical wit
the first except that it omits the words, "being the form of bettin
commonly known as bookmaking." Neither of these counts charge
anything more than divers acts of bookmaking in the ter
65 tory where it is conceded that bookmaking pure and simpl
is lawful. Hence they are insufficient.

In the second indictment the facts are set forth with greate
particularity. The first count charges that the defendant move
about exhibiting his program, offering to take and taking bets fro
divers persons and recording the same, and that in so doing he wa
accompanied and assisted by two employees acting respectively as
cashier and as a secretary. The second count is like the first excep
that it omits the allegations as to the employees. These counts ar

not legally different from the counts in the first indictment, and for the same reasons are held insufficient. The third count charges that the defendant did the same things charged in the first count except that he stood in one place instead of moving about, and charges that he was assisted by employees as in the first count. The fourth count is like the second except that the defendant is alleged to have stood in one place. In both the third and fourth counts the defendant is charged with having set up and kept a gaming table by the course of conduct therein described. They are insufficient for the same reasons as the former. The remaining counts, being the fifth, sixth and seventh, charge the defendant with setting up and keeping a place for gaming. In the fifth count he is charged with doing it by moving about with said two assistants and doing the things described in the former counts. In the sixth he is charged to the same effect except that he did not move about but stood in one place. In the seventh he is charged with doing the same things without assistants and standing in one place. The only new
67 question presented by these three counts is whether they show the defendant to have been keeping a place for gaming. Bookmaking is undoubtedly gaming and under the Miller case he would be liable if he kept a place for bookmaking within the meaning of the statute.

As urged by defendant's counsel, the doer of an act must always occupy some place. He cannot perform the act without it. If he bets it may be said that he uses the place where he is for betting. If he makes books at all he must use the place where he is at the time for that purpose. Hence it is not enough to say that the defendant stood in one place, or moved about in one place, making books. That is not saying that he kept the place where he was for the purpose of bookmaking, but only that he happened to be in that place when he was making books. The fact that he performed several acts of bookmaking in the same place does not necessarily mean anything more. The standing or moving about in the place is merely incidental to the bookmaking. It is quite another thing to keep a place for that purpose. That implies possession and control, at least for the time being. Perhaps it need not be a strictly lawful control. Perhaps a trespasser may be a keeper of a place in some circumstances. But it implies at least possession and control in fact if not in law. There is nothing in these counts that shows that the defendant was in possession and control of any place in any other sense than that he was necessarily somewhere when he did the things stated. To say otherwise would be equivalent to saying that one might lawfully make books but that if he did so either standing in one place or moving about in any space he would be guilty
68 of keeping a place for bookmaking. In other words there is nothing to show that the defendant's occupation and use of the place where he was, was anything more than was necessarily incident to the act of bookmaking itself which was in that place a lawful act.

If section 865 had been held to apply only to tangible devices and contrivances a plain broad line of distinction would have ex-

isted between the offense made punishable by that section and the offense made punishable by section 869; but when the Court of Appeals in the Miller case rejected that interpretation of section 865 and treated the section as applicable to a mere method of betting, such as bookmaking is, it is not to be wondered at that the distinction between setting up a method of betting on the one hand and using that method on the other hand, should be found to be somewhat metaphysical and difficult to apply. With every wish to follow the decision in the Miller case I have not been able to hold any of the counts in either of the indictments in the present cases sufficient. In neither one is a state of facts set forth that shows anything more than bookmaking as it must have been understood by Congress when section 869 was enacted. And by that section Congress prohibited bookmaking only in the cities of Washington and Georgetown and within one mile thereof. When Congress wishes to change the law it can do so without any assistance from the Court. The responsibility rests with Congress. As a citizen I should be glad to see a stop put to all gambling, but as a judge I must follow the statute and give it a fair and reasonable interpretation.

69 In accordance with the opinion here expressed the demurrer to each count of each indictment will be sustained and the indictments adjudged insufficient and quashed.

WENDELL P. STAFFORD, *Justice.*

It was thereupon stipulated that the decision of the Court of Appeals in the Miller case, as reported in 6 D. C. App., 1, should be considered in evidence and the same was read to the jury.

Thereupon, further to maintain the issues upon his part joined, the plaintiff called as a witness on his behalf Harvey Given, who gave testimony tending to prove that he is a member of the bar and one of the assistants of the plaintiff in his capacity as United States Attorney for the District of Columbia; that the Benning Race Track is located in the District of Columbia, about three miles from the boundary of the City of Washington, and that the Washington Jockey Club had its race track there; that, after the Davis case, the mode of betting there was changed, and that the bookmakers, instead of having a permanent place or location circled around within the Grand Stand, holding in their hands a program, standing in one spot for a moment and then moving to another place, receiving bets from men; that the odds would be exhibited on the programs which they held, with the names of horses on it, the bookmaker being attended by a man who had a small memorandum book in his hand, in which he recorded bets, and another man with a pocket book who accepted the money; practically every patron of the race had a copy of the program, which was sold outside and inside

70 of the race track by boys; that the bookmaking was carried on at the Spring Meet of 1908 in about the same way; that Davis came in and gave bail without being arrested; that Davis was at the race track and supervised the collecting of the paraphernalia used by him; he had collected three or four stools, on one of which he sat, exhibiting a small slate or board with the names of the hors-

and the races attached to it, and the odds he would give opposite the names of the horses; next to him on a stool sat a man with a lap-board, about 2½ feet long by 3 feet wide, holding a large sheet on which Davis would record the bets taken by him, and behind him was a man with a money box, into which he would put the money that was bet, this last man, also, having a stool which he used as a desk most of the time. Each bookmaker was given a place—that is, when he would take his place on the day of the race he would not leave it, and each had his number on a slate.

On cross-examination the witness stated that the stewards of the Jockey Club had control of the race track and of its business, and that witness was introduced by Mr. Ross, one of the stewards, to Davis, for the purpose of making a case against him; that witness had said to Mr. Ross, I am here to make a test case, which man do you want arrested, and Mr. Ross had said, I will let you know shortly, and in a little while took witness into the betting ring and introduced him to Davis, and witness proceeded to make a case against him, as the man whom Mr. Ross had selected; that neither the Jockey Club nor Mr. Ross was a defendant; that witness came to have his understanding with Mr. Ross about who should
71 be the defendant because of what he had told Ross; he did not want to make a raid and arrest everybody, and witness gave him the privilege of picking the man, because he was one of the stewards of the Jockey Club, which was very anxious to find out whether they were permitting violations of the law, and, in order to try that out, witness agreed with them to make a test case. He did this instead of arresting them all because the latter would have been an outside and unjust thing, because the Jockey Club and the men betting at the race track had been permitted to do it ever since the Klein case, and thought they had a right to do so. They had made arrangements for the meet, involving thousands of dollars of expense to the Jockey Club to the merchants and to the men who came here. The reason for wishing to make a test case was because there was so much involved; there were probably fifty bookmakers out there, each one of whom had about the same paraphernalia. Witness thought they might wind up a test case in six months or a year. Davis was arrested in the spring of 1904, and convicted in the fall of that year, after which they had their Spring Meet in 1907, a further meet in the fall of the year 1907, when nothing could be done to stop it. They were carrying on the same business, but in a different manner. The difference was that Davis had a place at which he could make books and do business, and at which he could always be found, consisting of a few stools in the betting ring, which ring was enclosed, but Davis' position in it was unenclosed. At the 1907 meet there was considerable complaint of trouble in finding the bookmaker to get the money by those who had won. You
72 might make a bet at one end of the ring and after the race was won your bookmaker might be at the other end of the ring. This was because they understood, after the Davis case, they had to keep moving. The device after the Davis decision was not so efficient as before, because you could not read the program so

well, but the principle was the same—you could make a bet all right with the bookmaker, after you had read the program and got at him. After the Davis case the bookmakers had a small program instead of a board, with the odds marked on it, one of his assistants had a memorandum book, instead of a lap-board for the betting sheet, on which to record the bets, and the other assistant had a pocket book instead of a money box, into which he put the money; a small bookmaker would take the money himself, having only one assistant. The only difference was that, instead of standing in one spot regularly assigned to him and making the bets, the bookmakers moved around, and the substitution of a book for a lap-board; that the difference between the programs which the general public had and that exhibited by the bookmakers after the Davis case was that the former did not have the odds marked on them, while the latter wrote the odds offered by him on this program in the vacant column opposite the names of the horses; that these were the programs offered to the public generally; that the arrangements were made in January, 1908, for the indictment of Walters, the Spring Meet being in the following March, and that the plaintiff and witness did not discuss the feasibility of getting a test case through the Court
73 of Appeals between the time of the indictment and the Spring Meet, whereupon the following ensued:

By Mr. DARLINGTON:

Q. "In your experience as a member of the bar, have you ever known of a case to go through the Court of Appeals in two months?"

To which counsel for the plaintiff objected that the inquiry was irrelevant, and the court said: "What is the purpose of it?"

Mr. DARLINGTON: "If a test case were intended to be brought with a view of making a test case of it, and of suppressing this thing which the statute intended to suppress, I submit that the bringing of it so near to a meet, and making a test case instead of making what has been distinguished as a raid or attack upon the proceedings was, in effect, justly and legitimately subject to the comment that it gave in effect these bookmakers notice that for at least one, possibly two meets, they could continue to do this thing without responsibility."

The COURT: "I do not think it is material."

Mr. DARLINGTON: "Your honor will allow us an exception?"

The COURT: "Very well; it is purely an opinion."

Mr. DARLINGTON: "I do not ask for an opinion, but for the course of practice in that Court, which the jury cannot know, and which a lawyer might know."

The COURT: "I do not think it is material."

To which action of the court, in sustaining the objection of the plaintiff and in excluding the testimony, the defendant then
74 and there excepted, and his exception was duly noted by the court upon its minutes.

Thereupon, further to maintain the issues on his behalf joined, the plaintiff called as a witness on his behalf A. S. WORTHINGTON Esq., who gave testimony tending to prove that he had been United States Attorney for the District of Columbia from January 1884 to January 1888; that he had been counsel for the Washington Jockey Club for 7 or 8 years, and had argued the Miller case in the Court of Appeals as such counsel; that, in his opinion, an indictment charging a man with carrying on a business without setting forth in the indictment the details which were supposed to constitute that business, would not be worth much; and, on cross-examination, that if a principal contention on behalf of a prosecution were that inviting bets from the public as a business constituted a gaming table, and if the court decided it could not pass upon that question, because the indictment for it charged only betting with two or three persons, there would be no difficulty in framing an indictment which should set up that the bets were taken by the defendant with any and all persons, but that, in his judgment, there would be some difficulty in sustaining it, though he had often found the courts differed with him about these things.

To further maintain the issues upon his part joined, the plaintiff introduced on his behalf Hon. ASHLEY M. GOULD, who gave testimony tending to prove that he is one of the associate justices of the District of Columbia; that he had seen the article in the Washington Herald of March 28th, 1908, which had been offered in evi-
75 dence; that he had directed the plaintiff's attention to it by telephone on the morning of its publication; that he had also seen the article in the Herald of March 30th, which had been offered in evidence; that he was the Justice of the Supreme Court of the District of Columbia who had gone to Rockville on the Saturday preceding these publications, with Mr. Baker; that they left Washington about lunch time Saturday afternoon; that witness was simply a guest or spectator at the meeting of the County Committee; that he had gone to Rockville on a two-fold mission, namely to transact some business in the office of the Clerk there, and in compliance with the request of Mr. Blair, a warm personal friend, to attend a conference of representative Republicans, to ascertain the chances of carrying the County so that Mr. Blair could get its support as a delegate to the National Convention. Mr. Pearre having stated that if Mr. Blair could come to the Congressional District Convention with his own County behind him, he would have sufficient support for him to enable him to be made a delegate, and witness was anxious to see this carried out; that witness attended the conference at Rockville which followed the meeting of the County Committee; that the question of finances may have been mentioned in a general way, but witness' recollection is that it was not mentioned, and there was no reason why it should have been; that some financial arrangements were made after the conference with individuals as to the expenses incident to the primary election, necessitated by having meetings, getting men out to rouse the interest of

the voters, the money for which is ordinarily contributed by
76 the man who is a candidate, and all of which, in so far as
witness knows, was contributed by Mr. Blair. That, so far
as his knowledge goes, the plaintiff did not go there with the intention of discussing finances, because it was unnecessary to do so, and because the persons who were present at the meeting were not people of sufficient finances for such a purpose; that, prior to the article in the newspaper, he had never heard it intimated, in any way, by any person, that any money was coming from the race track for any purpose whatever; that it was unnecessary to discuss the question how money was to be raised because Mr. Blair was to raise whatever money was necessary for the legitimate expenses of the campaign, and this was all agreed upon before they went to Rockville; that witness did not see any money dispensed in Mr. Baker's presence at Rockville, though he did see money given to Mr. Purdum, but Mr. Baker was not present at the time to the best of witness' recollection, although he may have been there; witness simply means he did not recall he was present in the hall where the money was given; that there was no concealment about it; Mr. Purdum was asked what would be necessary in his district to carry it in the interests of Mr. Blair; he stated an amount, and that amount was handed him by Mr. Blair. Mr. Blair had to carry the County for Pearre in order to receive Pearre's support, and this put him necessarily in opposition to Mr. Warner's candidacy; that an indictment charging a man with carrying on the business of bookmaking at Benning, on a date named, with nothing more in the indictment, charging no
offence but this, would be absolutely invalid, as stating a con-
77 clusion and not a state of facts.

Upon cross-examination the witness testified that where the court had declined to pass upon a question whether carrying on gambling as a business constituted an offence because the indictment charged gambling with two or three persons only, there would be no difficulty in framing a new indictment charging the accused with taking wagers or carrying on gambling with any and all persons, instead of with divers persons; that, at the Rockville conference, representatives would state what the defendant had been doing in the way of furthering his chances, and that the same thing would have to be done by anyone who wanted to beat him; that he had been spending a great deal of money, and had got "next to" the colored precincts, and things of that sort; that he did not recall whether anything had been said about the use of whiskey, that there may have been; that he remembers Sedgewick said his district was in favor of Warner, and that, possibly, to change that sentiment, he would have to use the same methods, and would have to have plenty of money; that he did not remember that he said they would have to use money and whiskey, but that he may have—both these implements are sometimes used in primary campaigns on both sides; that to the extent that money was necessary, the money needed to defeat Warner was discussed. Money is the principal thing, whiskey is an incident, and he does not know whether they reached that or not; that the reason given by witness why the subject of money had not been discussed between himself and plain-

tiff on the way to Rockville, namely, that the persons they were to meet there were not in a position to raise money, would not
78 apply to the question as to what money should be given them, and that this phase of the question was involved in the campaign; that he thinks the plaintiff's testimony was correct that, at the meeting, something may have been said in a general way to the effect that they would have to get up a campaign fund, and that after the meeting the matter was discussed by some of them, including the plaintiff, Mr. Blair and witness; that the testimony of the plaintiff that, on the way to Rockville he and witness discussed how Warner could be beaten, and that that was what they went there for, is in accordance with witness' recollection; that it was necessary to defeat the defendant in order to carry the county for Blair and Pearre.

In reference to the money given Purdum, witness further testified: "I remember Mr. Blair gave him $50.00, and I remember it was said by someone that if he needed more money he could get that later, and he said he did not need any more money at that time. When I say that Mr. Baker was not present when that remark was made, or when this money was passed to Mr. Purdum, I say I am merely speaking without any specific recollection, because it was a public place, and there may have been others standing there whom I did not observe."

Plaintiff further offered as a witness on his behalf WILLIS B. BURDETTE, who testified that he was present at the Rockville conference; that he saw the money handed to Purdum by Mr. Blair; that Judge Gould, Mr. John Abbott and himself were present, and that Mr. Baker was not present to the best of his recollec-
79 tion; that he did not recall the conversation, or any of it; that the group consisted of the gentlemen named and no others that he remembers, and that this is as far as he remembers about it.

Whereupon the following ensued:

"Mr. HOGAN: If the Court please, the Washington Herald of date March 28th and of date March 30th have been offered and are in evidence. We have produced here the Herald running from March 24th to April 4th, and it is in evidence and a fact that each of these papers contain one of the articles which went to make up the entire contract between the defendant and the Herald. We are in doubt as to the admissibility of all the articles, but we are perfectly——

Mr. DARLINGTON (interrupting): Why not offer those you want to go in?

Mr. HOGAN: We have offered those two, but we are perfectly willing, if our friends desire, to offer them all in evidence as part of the one transaction.

Mr. DARLINGTON: I thought we stipulated on the first day that anything that helped to make up the atmosphere of this case should be considered in evidence.

Mr. HOGAN: I am speaking only of the articles under the Warner contract. There are twelve of them here. Do you desire that

they shall all go in? We offer them as part of the one transaction. We make that offer now.

Mr. DARLINGTON: I consider that we stipulated on the first day of this trial that all articles in the Herald at a much earlier date, as the record will show, should go in. I think as far back as the 6th of March. I think it was stipulated that all articles of
80 that kind in the Herald during that period should be regarded as admissible evidence, for the purpose of showing what the atmosphere, as my friends call it, was. I have no objection to any article that my friend may offer.

Mr. HOGAN: We admit that. Now let us get away from that. Any of the articles relating to the race track, mentioning the race track, that have been produced here, between March 6th and April 4th, are in evidence.

Mr. DARLINGTON: You can read them. I do not regard them as evidence in blank—this way.

Mr. HOGAN: We will read them. Now, so far as the articles go, let us confine ourselves to this: The articles published under Mr. Warner's contract run from March 24th to April 4th. Two of them are in evidence. We offer all of them on the theory that they are all part of the one transaction made between Mr. Warner and the Herald, and therefore, for that reason, should go in.

Mr. DARLINGTON: I do not quite understand what our discussion is about. I agree to anything between those two dates.

Mr. HOGAN: Do you object to those offered now?

Mr. DARLINGTON: No; anything about the race track you can read now.

Mr. HOGAN: Then we offer them.

Mr. DARLINGTON: That is, provided they are read. I certainly object to them unless they are read.

The COURT: Do you insist upon their being read now?

Mr. DARLINGTON: Well, before the plaintiff closes his case.
81 The COURT: It will take a great deal of time that way. Can you not agree that either side shall pick out what they desire to offer. Let them identify what they offer, and read it any time they want.

Mr. DARLINGTON: If the court please, I have no objection to their being read any time before the plaintiff closes his case. I think we ought to know now what they want to read. I do not want them to read something to the jury later, because my case will be shaped by that.

The COURT: All I want to do is to save the time.

Mr. DARLINGTON: Is there any occasion whatever to offer these articles unless they want the jury to hear them? I do not want to be met, on the argument of this case, with a lot of matters which have not been brought to the attention of the jury, when I will not have time to answer them. It is perfectly idle to offer them unless the jury is going to hear them, and now is the time to do it before the plaintiff closes his case.

Mr. DAVIS: I do not know what the difficulty here is.

Mr. HOGAN: On page 6 of the Record there is offered in evidence

this file of papers, containing, each one of them, one of the series of advertisements under this contract. Mr. Darlington says: 'I have no objection to your offering the issues of March 28th and March 30th. I would like to see any others which you may offer as containing the advertisements during this period. When they are formally offered I shall want to look at them and make objec-
82 tions, if I have any'.

Mr. HOGAN: I also offer at the same time, while this witness is on the stand, the original copies. I offer all of them as part of one contract, but particularly the two issues I spoke about."

Mr. DARLINGTON: I have no objection to your offering in evidence the copy for the issues of the 28th and 30th. When the others are read I will look at them to see if there is anything objectionable.

Is there anything else, Mr. Darlington, about these papers?

Mr. DARLINGTON: Yes.

Mr. DAVIS: Where?

Mr. SULLIVAN: On page ten it reads:

"Mr. DARLINGTON: In offering these papers do you offer the whole paper; everything in the issue that relates to the race track?"

Mr. HOGAN: Yes.

Mr. DARLINGTON: Everything in the issues about the race track will go in?

Mr. HOGAN: Yes."

Mr. DARLINGTON: I think it would be highly improper for us to read the race track discussions which do not at all bear on the controversy between the plaintiff and the defendant in this case. I think we ought to designate what we rely on and read it. As far as I am concerned, the extracts will not be voluminous, and for the reason stated I think I ought to know before the plaintiff closes his case.

Mr. HOGAN: I will read first——

83 Mr. DAVIS (interrupting): Just one moment. Mr. Darlington has warned us that when this was formally offered, he wanted to look at it and make objections if he has any. We thought we would simplify this proceeding by simply taking him at his word, and offering everything; but, if we are going to take the time of the Court and of the jury reading all these things, that is quite another proposition. There are some of them which we think are utterly immaterial, but we are willing to include everything in the offer, on the supposition that Mr. Darlington knows what is in them, because he called for some of them himself. I started with the 24th day of March, and he asked to go back to the 6th day of March, presumably because he knows what is in the preceding articles. If we are asked to offer what we think material to this case, we may as well sit down and check it off.

Mr. DARLINGTON: That is the best thing to do. I think you will find very little of it that either of us want.

The COURT: That is what I suggested. Just check it off and offer what you want. In other words, as I understand it, you are offering the papers that have got this alleged libel in it right straight along.

Mr. DARLINGTON: A number of them do not refer to the plaintiff in any way at all.

Mr. SULLIVAN: That article was only published once.

The COURT: I thought it was an advertisement.

Mr. DARLINGTON: Mr. Warner had one every day as an advertisement in support of his candidacy; but quite a number

84 them do not refer to the plaintiff at all. I think very few them mention or refer in any manner to the plaintiff.

The COURT: I misunderstood that. I thought it was a standi advertisement.

Mr. DARLINGTON: Oh, no, sir; it is a different article every day.

The COURT: I could not see why you wanted to read that ev time from every paper. That is what I meant.

Mr. DAVIS: If your honor please, this attitude is a surprise to u I had supposed and my associate agrees with me,—we together h understood that the proposition was that if at any time we offered read any of these articles in any of these issues, except the two of t 28th and 30th, regarding Mr. Warner's campaign, it would be determined by him at the time of offer whether he had or had not a objection to make to them. We had no idea in the world that it w expected to read all these articles to the jury, or any of them, no than the two cards on the 28th and 30th, and we now limit our off to these two articles.

Mr. DARLINGTON: I still say that anything in them that relat to this matter, I am quite willing to let go in.

The COURT: The offer is limited to those two articles. Have th been read?

Mr. DAVIS: They have been read.

The COURT: Have you any further testimony Mr. Davis?

Mr. DAVIS: That is our case."

85 Thereupon counsel for the defendant made his openin statement to the jury stating it will be claimed that th article declared upon had no purpose to charge the District Attorney with having used his office to obtain money from the race trac people to aid in a political campaign as charged in the declaration that it was expected, on behalf of the defendant, to prove that, i the inter-party contest for the Republican nomination for Congres the plaintiff had gone from the District of Columbia, which w his official place of duty, to take part at Rockville in this contes that he took there an active part in ascertaining what money wa needed in particular electoral districts to carry them against ou candidate in favor of another; that for days if not weeks prio thereto the Commissioners of the District and others had been cal ing upon the plaintiff directly and through the public press to tak steps to prevent the gambling operations that were going on at th race track, the Superintendent of Police had applied to him to issu warrants to allow the police to arrest them; that the clergy of th City were appealing from their pulpits to stop those operations which they regarded as in the highest degree demoralizing to th young men of the community, and to the community itself, an that its representatives had called upon the plaintiff and urged tha steps to that end should be taken; that the press of the City wa

practically unanimous in appealing that something should be done, and that the District Attorney, for the reasons stated by him in his testimony, had declined to do anything himself, or to issue
86 warrants to anyone else to do anything; and that his action in that regard had been a subject of criticism from all known and usual sources of criticism of a public officer for days and weeks before the 28th of March, 1908; that in arranging for the advertisements in the Herald, the defendant was following the custom which was usual in Maryland politics, of advertising his candidacy, the reasons in support of it, and his answers to those who opposed it; that, prior to writing the article in question, he had learned that the plaintiff had taken part in the Rockville meeting, had called personally upon them to see what was needed to carry their districts against the defendant, that many of them had reported that they could only be so carried by the use of certain instrumentalities, of which money and whiskey were specified, and that, in at least one instance, the plaintiff had referred a district representative to a source of supply from which money could be had for those purposes; that the article of March 28th was written under the inspiration of this information; that, in that article, he had stated three things, namely: First, that the defendant considered it an undignified thing for a United States District Attorney for the District of Columbia to enter into a meeting at Rockville composed of political workers, white and black, and to take a part in ascertaining what money or means were needed to carry their districts, and in providing these means, which action the defendant considered a legitimate subject of comment; secondly, that he considered it a proper subject for inquiry, and one to which the voters would have a right to have their attention called, to learn where the money was
87 coming from that was being used to defeat him; and that Mr. Blair and other people were interesting themselves in disbursing a fund to defeat his candidacy; and, thirdly, that he thought it was his right, and he desired to call attention to the fact, that while the District Attorney was engaged in a proceeding of this character, the race track here was in full blast and the people had a right to know what he was going to do about it, just as the Commissioners, the Police Department, the press, the clergy and the business community had for days been asking "How about the race track? What are you going to do about that?" and that these were the only objects of the article; that the Court of Appeals had held that the setting up of a gaming table required no physical or tangible thing, but comprised, simply, the maintaining of any device, scheme or method of betting or gaming, as defined by the statute; that the matter in which bookmaking had been carried on at the race track was such a device, scheme or method of betting or gaming, carried on as a business, not with individual persons, but with any and all persons; and that in the Walters case, as was known to the community generally and had been specifically and repeatedly pointed out in the public press, the court had declined to decide the question whether the bookmakers were engaged in carrying on gambling as a business because the indictments had charged the defendant with making bets "with divers persons,"

which the court had decided might mean the making of bets wit
two or three persons, only, and not with any and all persons, i
such a sense as to constitute a business, and that the publi
88 authorities, the public press, and the community had f
weeks been urging that prosecutions should be instituted
which would obviate the defect pointed out by Judge Stafford i
sustaining the demurrers to the Walters indictments; and that witho
impugning, but on the contrary, conceding, the honesty of the plain
tiff's motives in the course pursued by him, and his belief that h
could not make a case, even by such an amendment, it would h
claimed that his refusal to attempt it, when the court had overrule
the indictment of the Walters case because it limited its charge t
the making of wagers with two or more persons only, was a prope
subject of comment, and the article sued upon was not properly t
be construed, in view of the facts and circumstances of the case, a
a charge that the plaintiff was getting money from the race track t
run an election campaign.

Thereupon, at the close of the said opening statement on behal
of the defendant, counsel for the plaintiff demurred thereto an
requested the court to rule that the defendant could offer no testi
mony to meet that which had been offered on behalf of the plain
tiff, in discussion of which motion, the following occurred:

By Mr. DARLINGTON: "Your Honor will recall that at the open
ing of this case counsel on both sides agreed that all the circum
stances under which the publication was made, touching what ou
friends call the atmosphere of the case, were material and it wa
distinctly stipulated that either side might read from these news
paper articles such parts as they thought proper, and that we migh
have the privilege of introducing and reading such publications i
that regard.

89 Mr. HOGAN: There was no statement of that kind.

Mr. DARLINGTON: On page 10 of the record.

Mr. HOGAN: Page 10 of the record does not show that.

Mr. DARLINGTON: Was not that the fact?

Mr. HOGAN: That was not the fact. If you so understood it, you
certainly mis-understood counsel.

Mr. DARLINGTON: This is the first time that point has been op
posed or denied. It was agreed I might send by the witness Cain
for issues of the Herald preceding March 24th, as far back as de
sired, and my friends offered all the papers that they produced—that
is, from March 24th to April 14th. The record shows as follows:

'Mr. DARLINGTON: In offering these papers, do you offer the whole
paper, everything in the issue'—It is put in the singular here—
'that relates to the race track?

'Mr. HOGAN: Yes.

'Mr. DARLINGTON: Everything in the issues about the race track
will go in?

'Mr. HOGAN: Yes.'

That is after we had called for and it was agreed we might call
for earlier issues if we desired.

Mr. HOGAN: We were clearly talking about the articles published
by Mr. Warner, absolutely and clearly talking about that, and

those were all the papers we had here and all we had offered. What you wanted the other papers for was none of our affair, and if there is anything relevant in the other papers, it can go in as previously stated.

90 Mr. DARLINGTON: The record speaks for itself. It was certainly the understanding of myself and must have been the understanding of the Court, and this is the first time, although the matter has been repeatedly referred to, that that claim has been presented, that that language was not understood the way it was stated.

Everything in those issues of the paper, not everything in the one article, but everything in the issues of those papers should go in.

Mr. DAVIS: Mr. Darlington is in error.

Mr. HOGAN: Horribly in error.

Mr. DAVIS: The fact is the papers were not offered at the time of this colloquy. They were not offered and when the question came up on the occasion of our last sitting, the last day we were here, this question was bruited and we cut the knots by declining to offer anything but the two articles, that of March 28th and that of March 30th. That was done the other day because there was a difference of apprehension as to just what this preceding colloquy meant, and we solved it by saying we will offer only those two issues.

The COURT: That certainly was so the other day. I believe this is the question that arose then, but I do not understand that makes any difference. If there is anything you are entitled to offer, of course that must be taken into consideration when such motion is made. That was merely a way of bringing up the question of the defense as a matter of law.

91 Mr. DARLINGTON: Therefore, since we have the right to offer anything in these papers bearing upon what my friend calls the atmosphere of the racing situation at that time, a demurrer forbidding us to offer any proof at all cannot be entertained.

The COURT: No, I do not understand it is forbidding you to offer anything at all. What I understood the motion to mean was simply to ask the Court to say as a matter of law that if you had presented your whole defense in your opening statement and that did not contain a legal defense, then there is no reason for going into the testimony at all, except it was suggested that something might not have been suggested which would be a matter of good defense.

"Mr. DARLINGTON: That is the second point to which I am coming.

"The COURT: If that appears at all, there is no reason for arguing this motion.

"Mr. DARLINGTON: The other reasons I am not at all disposed to avoid in the discussion. I expect at the proper time to ask a verdict directed for the defendant on the ground it is utterly impossible——

"The COURT: I suspect we will save time by going into the evidence. You may proceed.

Thereupon counsel for the defendant read to the jury from the opinion of the Court of Appeals in the case of Miller vs. United States, 6 D. C. App., p. 1, covered by the stipulation hereinbefore

noted, so much as related to the first count of the indictment
that case.

"By Mr. DARLINGTON: Then follows a discussion of the
ond count, which I do not think material, but whic
92 agree may be read if anybody wants it."

Thereupon JAMES T. PURDUM, called as a witness on behalf
defendant, gave evidence tending to prove that he was present
the Rockville meeting, that the plaintiff asked witness how his
trict was for Colonel Pearre, to which the witness answered
thought it could be carried; that plaintiff asked how much mo
was needed for Pearre in that district, to which witness answe
$100.00; that plaintiff asked how much was needed then, all
part, to which witness answered $50.00 would do then, and $50
later on, if they found they needed it; that they went out into
hall, and met Mr. Blair, and Mr. Baker asked Mr. Blair to g
witness $50.00, which Blair did; that the plaintiff called on anot
district and that Sedgwick answered, stating it would take a go
deal of money and whisky to carry that district for Pearre.
cross-examination, the witness testified that he did "not altogeth
attend the conference and have the talk in the interest of Colo
Pearre; that he took $50.00 to help beat Warner, that he did
vote for Warner in the contest directly; that he did not vote
delegates who were supporting Warner, necessarily, that there w
but one ticket in his district, which was not necessarily for Warn
that the ticket witness voted was not for the support of Warn
against Pearre, that the delegates voted for were not Warner me
but belonged to themselves, a delegation which could be used
they chose when they got to Rockville; that witness did not go
Rockville and advocate the nomination of Warner, that the delega
from his district did support Warner, but witness did n
93 know when he voted for them that they would do so.

Counsel for defendant then made the following offer: "As pa
of the circumstances under which this publication was made, as pa
of the atmosphere of the case, I offer in evidence a publication
the Washington Herald of March 7, 1908, at page 6, headed 'Was
ington's Disgrace.'" To which offer, the plaintiff objected and t
publication in question was handed to the Court, which thereupo
ruled that the publication of March 28, 1908, was not susceptib
of two interpretations; that it is a charge that one of the justices
that court, together with the District Attorney for this District, we
to Rockville to determine what ammunition was needed to defe
one of the candidates for the Congressional nomination; that th
only justification for the construction contended for by the defendan
was contained in the article of March 30th, which had been intro
duced in evidence by the plaintiff; that, if the later article ha
been published co-incidentally with the other, it might have bee
explanatory of it, might have suggested that it meant nothing mor
than that the plaintiff was neglecting his duty, but that the cou
could not permit such a conclusion to be drawn by the jury fro
the subsequent article which was published two days later, an

which may have been published to take out the sting of what had been published in the previous article; that the article of March 30th having been published subsequently to the article sued upon, it seemed to the court that it could throw no light upon the question of what existed before its publication; that the first article charged that the two gentlemen named in it attended a conference of the defendant's enemies to determine what amount
94 tion was needed to defeat him—that is what money was needed to defeat him; that the meaning of this was answered in the next phrase, "The question now is, where does the money come from in the contest against Mr. Warner?"; that Judge Gould and the plaintiff were the persons pointed out by this question, and that the answer to that, although put in the shape of a question was, "How about the race track?"; that this had the same signification to the mind of the court, as if the article had stated: "It comes from the race track people, whom we are claiming to be the people whom Mr. Baker has not prosecuted with the diligence with which some people think he should have prosecuted them." As to the proposition that the articles which had appeared in the public press before and after publication of the article in suit, should be submitted to the jury as reflecting upon the intent of the defendant, the question was, what light did fair comment throw upon that intent, where the intent was manifested by a charge that is libellous per se. The purpose and intent of a person who libelled another could not be tried by asserting that the libellous matter was inspired by the honest and fair comment of other people; that the court could not imagine on what theory such testimony could be received, that the court's ruling did not exclude evidence upon the question of compensatory or exemplary damages, that anything might be introduced which would place the jury in a position to say whether or not the defendant ought to be punished, but that the court would sustain the objection to the new-paper articles proffered on behalf of the defendant
95 when offered formally for the record.

"Mr. DARLINGTON. If the Court please, I now propose to offer several extracts from the Washington Herald of certain dates which I will specify. I offer each extract separately, and I offer each extract on three grounds. First, that it is covered by the stipulation of record between counsel that everything relating to the race track question in these issues might be admitted, on the faith of which stipulation the defense was governed throughout the plaintiff's case, the first intimation of any objection being made after we began our case. I offer them, in the second place, as tending to show the facts and circumstances surrounding the situation under which the article sued upon was published, and, therefore, as tending to show the reasonableness of the construction contended for by the defendant as to the intent and meaning of the articles. I offer them in the third place as tending to show the facts and circumstances under which the defendant published the article, and, therefore, as substantiating or corroborating the testimony which we expect to offer on his behalf, that this article was published with a wholly different intent

from that which the Court has found it to bear, and as bearing u
the question of the character and the amount of damages.

I offer first the following from an article in the Washington He
of March 7, 1908, dealing with the race track question:

"What is going to be done about it? What are the author
doing or going to do?"

Mr. DAVIS: Is that an editorial?

96 Mr. DARLINGTON: Yes. "Is this spring meeting
scheduled, with its attendant evils, to be permitted?

"Is Washington, the Capital of the Nation, again to give i
over to an orgie of gambling and disgrace itself anew?"

I understand that is objected to, the objection is sustained, and
exception noted?

The COURT: Yes. It ought to appear in some way or other
the Court is not a party in any wise to any agreement betw
counsel.

Mr. DARLINGTON: It was made in open court, and on the rec
without any indication on the part of the Court that it was no
understood.

The COURT: I did not then so understand it.

Mr. DAVIS: All of what is in the record on that point will go
and it will fail to show a stipulation.

Mr. DARLINGTON: I next offer an article on the first page of
Herald of March 19, 1908, of which the following is an extract–

Mr. DAVIS: Is it an editorial or reporter's matter?

Mr. DARLINGTON: I suppose it is reporter's matter; it is on
first page.

"The United States district attorney thinks it is useless to pr
cute under the present inadequate law, and so advises the major
superintendent of police not to make any more arrests. And
at the autumn meeting at Benning last year, the United States
trict attorney asked Maj. Sylvester to send a number of officers
to the track to watch the gambling."

97 Then follows what purports to be a quotation from
plaintiff:

"I did it so as to see that the bookmakers did not set up perman
stands, as in the Davis case," he says, "but were kept moving ab
It is on this question of 'ambulatory' betting that we are wait
for the courts to decide."

Then a question by the reporter:

"Is it true that it has been because of your instructions that
police of the District have not interfered with the bookmakers
Benning?"

Then an answer purporting to be by the plaintiff:

"There is no use in making arrests when there is no law to just
them. I have told the police that."

I understand that that offer is objected to, objection sustain
and exception noted.

The COURT: Yes.

Mr. DARLINGTON: I next offer this extract from the same artic

"What will be your advice to the police as to the public gambling at Benning during the coming meeting?

"I don't know. I may order another arrest and have another test case. But I don't feel that there is any use in doing much until we hear from the courts about the case that is now awaiting a decision."

Mr. DARLINGTON: I understand this offer is objected to, objection sustained, and exception noted.

The COURT: Yes.

98 Mr. DARLINGTON: I next offer the following extract from the same article:

"It is precisely at this point—at the office of the United States district attorney—that the movement to wipe away the disgrace of public gambling from the National Capital is blocked. 'We have done all we can.' Seems to be the blank wall against which effort has hammered in vain, and which leaves so wide a loophole that unless some drastic action is taken the bookmakers will ply their trade at the Benning spring meeting as they have done in the past."

I understand that objection is made to that offer, the objection sustained, and an exception noted.

The COURT: Yes.

Mr. DARLINGTON: Then, from the same article, I read the following from an interview with Commissioner West:

"In view of the statement of the United States District Attorney for the District of Columbia as to the bookmakers at the Benning track, I am of the opinion that the present law as indicated by the Court of Appeals would justify criminal proceedings against them."

I understand this offer is objected to, objection sustained, and an exception noted?

The COURT: Yes. I assume, gentlemen, you are objecting to all of these?

Mr. DAVIS: Yes, your Honor.

Mr. DARLINGTON: Then, I offer from the same article a quotation from an interview with Commissioner Macfarland, as follows:

"Now, all that the District government can do is to make
99 arrests through its police department. It cannot prosecute the offenders. The only officer who can do that is the United States district attorney, who is the representative of the national government, and not of the District government, and who is not in any way under the authority of the District Commissioners. Arrests without prosecutions are ineffective."

(Same objection and same record.)

Mr. DARLINGTON: I next offer the following interview with the Superintendent of Police, Major Sylvester, as shown in the same article:

"There is no use in making arrests if the district attorney declines to prosecute; in fact, after one man had been arrested for bookmaking, I was instructed not to make any more arrests until this one—a test case—had been decided."

(Same objection and same record.)

Mr. DARLINGTON: I next offer an editorial from the Washington Herald of March 10th, as follows:

"Gambling at the Benning race track can be stopped if the authorities of the District of Columbia resolve to stop it.

"District Attorney Baker can stop it by prosecuting the gamblers vigorously, persistently, and relentlessly."

(Same objection and same record.)

Mr. DARLINGTON: I next offer an editorial from the Herald of March 11, 1908, as follows:

"It is evident that Commissioners Macfarland and West and Police Superintendent Sylvester believe that all that is necessary to stop the public gambling at Benning—to wipe out the evil altogether—is the active aid and energetic co-operation of the District attorney's office."

(Same objection and same record.)

Mr. DARLINGTON: I next offer, the following, which appears on the first page of the Herald of March 12, 1908:

"District Attorney Baker will to-day note an appeal from Justice Stafford's decision, but it appears to be clear that the case will not be reached by the Court of Appeals until the April term, unless Mr. Baker appears and asks that the case be specially set for argument."

(Same objection and same record.)

Mr. DARLINGTON: I then offer another extract from the same article, as follows:

"District Attorney Baker noted exceptions to Justice Stafford's instructions as to what constituted a violation of the code; notably, that the making of a number of bets by one person did not constitute a bookmaker in the sense that it was setting up and maintaining a gaming table."

(Same objection and same record.)

Mr. DARLINGTON: Next, I offer another extract from the same article:

"* * * It is the custom in courts, to advance for argument, at the request of the district attorney, cases wherein the interest of the public at large is concerned, and it is thought Mr. Baker will become alive to the crying demand of the people of Washington to appear at once before the three justices constituting the Court of Appeals of the District of Columbia and request that the cases of William Davis and John Walters be specially set for argument."

(Same objection and same record.)

Mr. DARLINGTON: I next offer the following from an editorial in the Herald of March 12, 1908:

"But even with the law as it is, and as interpreted by the courts, we do not believe that the Commissioners or the district attorney are helpless to prevent bookmaking or to prosecute the gamblers. There are some very significant observations in Justice Stafford's opinion concerning the insufficiency of the indictments brought in the Walters case. It may be possible so to frame an indictment as to pass muster in the courts, if it be shown with sufficient clearness that bookmaking has been 'set up' on the Benning track."

(Same objection and same record.)

Mr. DARLINGTON: I next offer the following, which appears on the first page of the Herald of March 23, 1908:

"Ministers of the gospel in the Nation's Capital gave their congregations much food for though concerning the Benning race track and the busy gamblers who flock there."

The above is followed by extracts from a number of addresses of clergymen. It is unnecessary to encumber the record with them, but I offer them.

(Same objection and same record.)

Mr. DARLINGTON: Then follows the sermon of the Rev. Dr. Power, of which I will give a portion, to show the character of these sermons:

102 "Benning is to-day a center of attraction to the most vicious and lawless class in America. Benning is our nearby entrance to the bottomless pit. Benning receives to-day, New York papers tell us, hundreds of bookmakers and blacklegs who have been driven out of the Empire State by Gov. Hughes, and who will set up, in full sight of the big red jail where they belong, the betting ring and proceed to fleece the public."

(Same objection and same record.)

Mr. DARLINGTON: Then I offer another extract from the sermon of the same speaker:

"The business at Benning is gambling—plain, vulgar, unvarnished, commonplace, criminal gambling. 'Improving the breed of horses' is the euphemism for dwarfing and damning the breed of men. Round and round the horses go, and out of the hopper of the swift machine come the blunted moral sense, the dissolute life, the defaulter, the thief, the suicide, the murdered, ruined men, beggared women, wretched little children."

(Same objection and same record.)

Mr. DARLINGTON: Then follow extracts from the sermons of other persons, which I will not offer, as one is sufficient.

I next offer the following from the editorial page of that same issue, March 23, 1908:

"At the very gates of the city, almost within the shadow of the Capitol and the White House, a crowd of professional gamblers, commonly called bookmakers, will be found engaged in their disreputable business—carrying it on openly, brazenly and de-
103 fiantly—while the shamefaced authorities watch the demoralizing proceeding, confessedly helpless and impotent."

(Same objection and same record.)

Mr. DARLINGTON: I next offer the following on the first page of the issue of the Herald of March 25, 1908:

"Commissioner Macfarland, while upholding the present law as sufficient to prosecute the gambling offenders, welcomes the Simms bill with open arms, at the same time refuting the persons who hold that the recent decision rendered by Justice Stafford makes it utterly impossible to proceed against bookmakers".

(Same objection and same record.)

Mr. DARLINGTON: I next offer the following which appears in the same article, on the second page:

"Commissioner West said:

"The effort to secure warrants for the arrest of bookmakers at the Benning race track signally failed. Upon complete information of bets made at the race track, the district attorney informed Maj. Sylvester that the actions brought to his attention did not constitute any violation of law."

(Same objection and same record.)

Mr. DARLINGTON: And I offer the following from the same article; quoting Commissioner Macfarland:

"I have done everything in my power to break up the gambling at the Benning race track, believing that it is damaging to the economic and moral interests of the National Capital. If I could have had my way, the gamblers would have been raided by
10 the police in force every day. As it is, cases have been made by the police department, which has submitted the evidence to the United States district attorney, who has declined to prosecute."

(Same objection and same record.)

Thereupon, the defendant offered in evidence an article published in the Washington Herald on March 28, 1908, which said article is in the words and figures following:

"*Congratulations.*

"Quick to recognize courage—cool, unflinching courage—whenever it sees it, The Big Stick is instant in its most hearty congratulations to the Hon. D. W. Baker, United States district attorney; to Commissioners West and Morrow, also, for their brave and manly and unyielding stand against the betting evil in the District of Columbia. It is due almost entirely—nay, quite—to the efforts of these able servants of the republic—these men who never dodge nor shirk, but ever fight for the right—that the rapacious bookmakers, blacklegs, and gamblers no longer prey upon the public.

"Some credit is due, doubtless, to the well-known citizens, officers of the Washington Jockey Club, who have only, in encouraging race meeting at Benning, the betterment of the breed of horses in mind, have consistently and bravely set their faces against any official cognizance of the fact that betting was carried on on their premises.

"The citizens of Washington and The Big Stick also join in some public testimonial to the gentlemen mentioned—some-
10 thing that will testify for all time how highly they are regarded for their unselfish stand in the interest of morals and good government. The Big Stick will cheerfully be the recipient of any sums tendered by a grateful public for the purpose of purchasing jelly-fish medals of suitable design (may we suggest an allegorical figure of Law crushing Common Sense?), and at the proper time will gladly head the list."

The defendant also offered in evidence an editorial article published in the said Washington Herald on March 30, 1908, said article being as follows:

"Stop the Gambling.

"The race track meeting at Benning is flourishing, and from all accounts the professional gamblers, the bookmakers, the touts, and the tipsters are flourishing, too—at the expense of the Washington public:

"All over the nation municipalities are striving to eradicate the gambling evil from their midst. Looking toward the Nation's Capital for example, theretofore they have found Washington apparently supine and helpless in the grasp of a gang of blackguardly gamblers."

The plaintiff objected to the introduction in evidence of these two newspaper articles and the court sustained said objection, to which action of the court in sustaining the objections on behalf of the plaintiff to the last two quoted newspaper articles, and in refusing to permit the same to be introduced in evidence, or read to the jury, the defendant separately excepted, each of which exceptions was duly allowed by the Court and noted upon its minutes.

106 Mr. DARLINGTON: In connection with each one of these extracts offered in evidence, I offer to prove that they were all read by the defendant, that none of them were contradicted or refuted or denied in any way, and that in conjunction with other facts within his knowledge, to which he can testify if permitted to do so, he had reason to believe, and did believe, that they were true; that it was in this condition of this public question in the community that this article was written, and that the words "How About the Race Track?" were used to indicate a comment upon or criticism of the action of the District Attorney in leaving the race track unattended to while engaging in local politics in Maryland. I understand that objection is made to the offer of all these matters, that the objection is sustained, the articles are excluded, and an exception noted.

The COURT: Yes.

To the action of the court in sustaining the objections on behalf of the plaintiff to each of the foregoing extracts, and in refusing to permit the same to be introduced in evidence or read to the jury, the defendant separately excepted, each of which exceptions was duly allowed by the court and noted upon its minutes.

Mr. DAVIS: The grounds of objection as heretofore stated to these various offers are that as to matters of fact supposed to be stated in them, they are hearsay; as respects the matters in issue on the pleadings they are an attempt at justification, without pleading the same; that as to the use of them in support of the construction of the article contended for by counsel for the defendant, they are

107 immaterial in that the article is incapable of that construction; and that as to any and every possible issue made by the pleadings in the case, they are incompetent and irrelevant.

Thereupon the counsel for the defendant, stating that he did to meet the objection made by the plaintiff that, there being plea of justification in the case, the defendant was not at liber to prove that the article sued upon was true in the sense in whi it was claimed he intended it, and that, if allowed, no delay wou be asked nor additional witnesses called because of it, moved t court to file the following amended or additional plea.

In the Supreme Court of the District of Columbia.

No. 50111. At Law.

DANIEL W. BAKER
vs.
BRAINERD H. WARNER.

Amended Plea.

The defendant, by leave of the Court first had and obtained amends his plea in the above entitled cause by adding thereto th following:

2. And, for further plea to the plaintiff's declaration, the defend ant says that the publication complained of did not state that th plaintiff entered into a conference to determine how funds should be raised, for the contest against the defendant, nor that he was obtaining funds from the Washington Jockey Club or persons
108 making wagers at the race track, or was corrupt or improperly influenced in the discharge of his official duties in the prosecution of the said Club or persons; and that, with respect to the plaintiff, the said publication only says, and means, in substance, that the plaintiff entered into a conference to determine what am munition was needed in the several election districts of Montgomery County, Maryland, to defeat the defendant in his contest for the Republican nomination for Congress, and to inquire, as was then being done by many persons, official and private, and by the public press and otherwise, generally in the District of Columbia, what action the plaintiff was taking to suppress the race track gambling then in open progress at Bennings. In this, its true intent and meaning as herein pleaded, the defendant says that his said publica tion was true in fact.

(Signed) J. J. DARLINGTON,
Attorney for Defendant.

The plaintiff objected to the amendment, on the ground that it was in direct opposition to the construction already given to the alleged libel by the court, that it was immaterial, that it was an attempt, by a plea, to give a translation to the libel, and then to say that the translation was true, that it was a plea to the innuendo, and that it amounted to the general issue; whereupon the court denied leave to file the amended plea on the ground that the defense set up in it could be made under the general issue, and that the article sued upon

was not susceptible of the interpretation given, to which ruling of the court the defendant then and there prayed an exception,
109 which was allowed by the court and entered upon its minutes.

Thereupon the defendant, BRAINERD H. WARNER, produced as a witness on his own behalf, gave testimony tending to prove that he had been a citizen of Montgomery County, Maryland, since 1891, that he was a candidate for the Republican nomination to Congress in 1908, that the articles published by him in the Washington Herald under contract as shown by the plaintiff's evidence, had no other purpose than in the interest of his candidacy for that position, to make the people acquainted with his candidacy; that the article of March 28th, sued upon by the plaintiff, was one of the articles so written by the defendant, which were published in the advertising columns of the Herald; that the reference in it to Col. Pearre's statement in regard to a monkey and a hand-organ was for the purpose of showing what the defendant considered a very undignified proceeding on the part of a candidate for Congress; that his second reference in the article was the statement of an objection by him to the action of the United States District Attorney in going outside of the District for which he was appointed to indulge in political conferences, and lowering the dignity of a Presidential appointment, which was quasi judicial in the estimation of the defendant, and which by time-honored custom excluded this sort of petty participation in politics; that the clause of the article, "to determine what ammunition was needed to defeat Warner," was an explanation to the readers to show why they went there, the defendant having information that the District Attorney acted as floor manager at that conference, and asked
110 the representatives from the different districts how much money and what other means were necessary to defeat the defendant, the representatives being called up one by one, and sent out into the hall to get the necessary ammunition, there being in that room at that time, in violation of the spirit of the Civil Service, several postmasters, one employee at least of a Department of the Government and a United States District Attorney, which circumstance the defendant put up for the consideration of the readers of the paper, as being what he considered improper conduct; that the reference in the article to where the money came from in the contest against the defendant was because the witness wished to know that—it had been alleged that he had circulated money through the county, and he wanted to know where this money was coming from, whether from these Government employees, or whether it was given by Mr. Pearre or by Mr. Blair; and that with respect to the concluding paragraph of the article "How about the race track"? the defendant had no idea or thought of libelling the plaintiff, that he did not consider that he or any other officer in his position would be fool enough to reach out his hand and take money from the race track for any political or campaign purpose; that the air had been full of this race track business for a long time past, defendant's attention had been called to it, he had, himself, endeavored to aid in breaking up the race track and pool selling, that objections to it were coming from

every class of the community, from mothers, fathers, teachers preachers, and it all centered, whether justly or not, on the office of the United States District Attorney; that the defendant had
111 no personal feeling against the plaintiff, but thought he was wrong in going to that conference and lowering the dignity of the office, and that he was wrong in not making any response to this public clamor, coming, not only from citizens, but from the Commissioners, and that he ought to have remained at home and given the very closest attention to the suppression of that evil; that the information in regard to the plaintiff's non-action in the matter of prosecuting the bookmakers had come to the witness through the public press, that he had had several interviews with the Corporation Counsel of the District of Columbia, had talked with various persons, and had reached the conclusion that the indictment in the Walters case was defective, that a proper case could not be made out under that indictment as presented, the defect being that it was insufficient in that general gambling was not charged, but, only, gambling with divers persons, which could mean one, two or three, and not the public generally, and that the defendant had gotten the opinion from the Corporation Counsel that other cases could be made which would govern the case.

Thereupon the counsel for the defendant asked the defendant whether or not he had read each and every of the articles published in the Washington Herald which had been offered in evidence and which had, under objection, been excluded by the court as above set forth, to which question the plaintiff objected, and the court sustained the objection and excluded the question, to which ruling of the court the defendant then and there excepted, which ex-
112 ception the court allowed and duly noted upon its minutes.

The defendant thereupon gave further testimony on his own behalf tending to prove that he first learned or gained any conception that his article of March 28th was liable to be understood as intimating that the race track was, or might be, a source from which money was being obtained by the plaintiff or anybody else for use in the campaign against him, the day before summons was served upon him in this action.

Thereupon the defendant's counsel propounded to the defendant the question whether he, himself, had furnished whiskey in order to secure his nomination, stating, upon objection to the question, that it was propounded because of evidence introduced on behalf of the plaintiff that the defendant had been reported at the Rockville conference as doing the same thing for which he was criticising the other side, that he offered to prove by the witness that he did not contribute a dollar for the purpose of whiskey, that he expressly prohibited it, and that none was furnished in support of his candidacy, either with his approval or to his knowledge, and that the offer was for the purpose of obviating adverse argument or any impression on the minds of the jurors that the defendant's explanation was open to the inconsistency that he was doing the very thing for which he was criticising his opponents, but plaintiff's counsel objecting that there was no evidence that the defendant had furnished money to

purchase whiskey to influence his nomination, but the court sustained the objection and excluded the testimony, to which ruling the defendant excepted and the exception was duly noted upon
113 its minutes.

Thereupon defendant's counsel propounded to him the following question:

"Do you know the legal conditions in Montgomery County in regard to the sale of liquor, whether it is known as a dry county or not?" to which question the witness answered "It is dry", and the plaintiff by his counsel objected, and counsel for the defendant stated that the object of the question was to show that, if an officer charged with the enforcement of the law in the District of Columbia were engaged in determining what means, including the use of whiskey, the sale of which was prohibited by law, were necessary to carry the election in Montgomery County, such fact would give force to the proper occasion of the comment which the defendant claims he intended by the article in suit, but the court sustained the objection, and refused to admit the evidence, to which ruling the defendant then and there excepted, which exception was allowed by the court and duly entered upon its minutes.

Thereupon the following question was propounded to the defendant by his counsel:

"I will ask you to look at this article of March 30th which has been introduced in evidence, and state whether you wrote and published that article? "A. I did.

"Q. And, if so, what was your intent in doing it and the meaning which you intended by it?"

The said question was objected to on behalf of the plaintiff on the ground that the jury is to ascertain the intent as well as the
114 meaning of the paper from the paper itself and the circumstances under which it was given publication, and on the further ground that this article was not in suit, and that by the question the defendant was called upon to construe his own self-serving declaration. Thereupon, the following ensued:

Mr. DARLINGTON: Who put it in, and why?

Mr. DAVIS: Never mind. I am talking about the testimony. You are at liberty to read that article to the jury and to comment upon it as you please, but I say by no principle of the law, and under no rule of evidence is it permissible for a witness to explain a self-serving declaration made after the fact under inquiry."

The COURT: Let me look at that paper. I have forgotten what it is.

Mr. DARLINGTON: This article was introduced by the other side as part of their case, for some purpose. I submit we have a right to explain it, just as we did the other one.

The COURT: Mr. Darlington, I do not think that article is in controversy. I do not exactly see the relevancy of the testimony. I allowed the other to go in because it went to another question entirely, upon a different theory, because I had ruled that in my judgment the other article was libellous *per se*. I do not so rule as to this one. They have some motive in offering it in evidence,

I suppose. I don't know what the motive was, and I don't s
the relevancy, therefore, of any explanation about it.
115 do not see that it explains anything. The article explai
itself. I sustain the objection."

To which ruling of the court the defendant then and there praye
an exception, which was allowed by the court and duly noted upo
its minutes.

Upon Cross-examination, the defendant gave evidence tending
show that the allusion to Col. Pearre in the article of March 28
was to show to the public the character of the Representative the
had in office, and the character of the conduct of his campaig
which witness regarded as very undignified; that the reference
the plaintiff was based on the defendant's objection to him as Di
trict Attorney going to Rockville, outside the District, to indulg
in political conferences—not to the plaintiff as an individual, bu
rather as United States District Attorney; that he had a right t
vote and think as he pleased, but witness objected to his loweri
the dignity of the Presidential appointment, which should stan
before the people above reproach; that he considered the primari
leading up to the selection of a candidate for Congress as pett
affairs; that, before publishing the article, and after the plainti
had indulged in speeches on various occasions referring to the d
fendant as an ass, a fool, and unworthy the support of the Repub
lican party, witness had stated to him in a letter that he considere
his participation in politics as not desirable or dignified; that th
criticism did not involve a discussion of the general issues in th
campaign, or ordinary participation in politics; that witnes
115 objection might possibly have sprung out of the fact that th
plaintiff had attacked him in the way stated, but that hi
contention had rather been attracted by the violation of the Civi
Service regulations; that the designation of the defendant by th
plaintiff as an ass and a fool did not impel him to make the pub
lication; that it influenced him, undoubtedly, but did not impe
him to do it; that, as he had testified in chief, he had two or thre
years before declined active participation in a campaign to suppor
the plaintiff because he felt that plaintiff had no right to indulg
in active participation in politics, which the defendant claime
was in violation of the laws and of the Civil Service rules; that de
fendant's son was very active in supporting Mr. Baker for the posi
tion of chairman of the Republican County Committee, and wit
ness protested against it to him, and, himself, took no very active
part, and did not vote for Mr. Baker that he thought the plaintiff,
though a Presidential appointee confirmed by the Senate, was within
the Civil Service regulations, not so far as questions of general
propositions are concerned, but when he gets down to be a candidate
for a district committee and seeks to influence the voters by going
around among them, personally soliciting them; that the Civil
Service regulations, as modified, prescribed that a man may take a
proper part in a campaign, but ought to avoid petty participations
which bring scandal upon the Department or reflection upon the
dignity of the position he occupies; that in the instructions to such

officers issued by President Cleveland on July 14, 1883, he declared that they should "scrupulously avoid in their political action,
117 as well as in the discharge of their official duty, offending by display of obtrusive partisanship, their neighbors who have relations with them as public officers"—that their party friends from whom they had received preferment had not invested them with the power of arbitrarily managing their political affairs, that the influence of federal office holders should not be felt in the manipulation of political primary meetings and nominating conventions, that the use of their position to compass their selection as delegates to political conventions was indecent and unfair, and that proper regard for the proprieties and requirements of official place would also prevent their assuming active conduct of little campaigns; that in the letter of President Roosevelt to the Civil Service Commission of July 13, 1902, it is declared that office-holders must not use their offices to direct political movements, neglect their public duties, or cause public scandal by their activity; he thought outside of the classified service the effort to go farther than this had failed so signally and its unwisdom had been so thoroughly demonstrated, the President felt it necessary to draw the distinction indicated; that in the order of the Attorney General of November 14, 1901, addressed to all officers and employees of the Department of Justice it was declared that the spirit of the Civil Service law and rules rendered it wholly undesirable for federal officers and employees to take an active part in political conventions, or in the direction of other parts of political machinery, and that persons in the Government service under the Department of Justice
118 should not act as chairmen of political organizations, or make themselves unduly prominent in local political matters; that the United States Civil Service Commission circular, form No. 1236, page 5, prohibited all persons in the service of the United States from giving, directly or indirectly, to any other person in that service any money to be applied to the promotion of any political object whatever; that by an order of the Department of Justice of October 13, 1905, it is provided that all persons serving under that Department were recommended to refrain from service on political committees charged with the disbursement and collection of campaign funds; that, at the time of the publication sued upon, defendant understood the plaintiff to be chairman of the Clarksburg District Republican Committee, acting chairman of the State Central Committee, and floor manager of the conference at Rockville; that these Civil Service laws and regulations were in his mind at the time he published the article in suit; that defendant had chided his son for assisting the candidacy of the plaintiff in Montgomery County two or three years ago, because he did not think it proper for him to do so, the plaintiff being a public officer, namely, United States District Attorney; that, on March 19, 1908, he wrote the following letter to plaintiff: "I want to protest against your active participation in the campaign for naming a candidate for the Republican Party at the November election. I cannot imagine why you should show such pernicious activity in opposing my candidacy: When you were a candidate, I supported you, and my son,

Mr. B. H. Warner, Jr., certainly devoted much time and money t
your interest;" that he did not oppose the plaintiff, but gav
119 him no active support; that he protested to his son severa
times that he ought not to support him, and it was a poin
almost of conflict between them; that he did not actively support plaintiff in his campaign for county chairman, because he considered it undignified and improper for him to devote the time and money that he was putting into that campaign for a petty office; that, in the letter, he meant that he had not indulged in any active support, his support had been passive, and that his son had been especially active, as he had been; that the letter in question continued as follows:

"When a representative of the Department of Justice steps out of the line of duty and wages a warfare on a citizen of his own county, and charges him with not being a resident of the county, and makes statements regarding his vote, it seems to me he is, to say the least, subjecting himself to very sharp criticism. Before entering upon such a campaign, he should resign and get his name off the Government payroll, and stop using the influence of his office to influence or intimidate in any possible way the vote of anyone. I drop you this line in a friendly way to assure you, until some other event occur, whatever action I may take will be, not so much against you, as to protect the official dignity which surrounds your office according to the intention of Congress which created it;" that, by the expression "until some other event occur," he cannot say what he meant,—it may mean that, if he did not stop, defendant would go against him personally, that he wrote about the same time some letters to the Attorney General, one of which enclosed a news-
120 paper clipping to the effect that a mass-meeting was held at Gaithersburg on March 18th, in the interest of Congressman Pearre for re-nomination, being the opening of his campaign, that speeches were made by Col. Pearre, the plaintiff, Gist Blair and others; that the letters of the defendant to the Attorney General were as follows:

MARCH 19, 1908.

Hon. Charles J. Bonaparte, Attorney General.

DEAR SIR: As you will note from the enclosed newspaper clipping from the Baltimore Sun, two prominent employees of the Department of Justice, Hon. D. W. Baker, United States Attorney for the District of Columbia, and —— ——, one of the assistants in your office, are taking an active part against me in the campaign I am waging to become the candidate of the Republican party in Congress from the 6th District of Maryland.

The absolute impropriety of such pernicious activity on the part of either of these gentlemen, you will, of course, recognize without any argument by me, and especially when many proceedings are being instituted by the Government in its effort to enforce obedience to law, and I think liable to affect unfavorably the interests of a large number of different parties who for prudential reasons may prefer not to risk any possible friction with a Government officer who has

the right to prosecute. While I have no fear in this direction, I do not feel any restraint because of the position of anyone, yet
121 many people who hold the Department of Justice in awe are certainly affected in their freedom of action by the active participation of such officers whose influence is largely created by reason of the Department they represent.

I, therefore, earnestly appeal to you in the interests not only of a full ballot and a fair count, but of good government, that the parties named be requested to cease their active participation in the primaries at which no party principle is at stake, but only the selection of the man who is to represent the Republican party at the coming election.

With great respect,

Yours sincerely,

B. H. WARNER.

1 enclosure.

"MARCH 21, 1908.

Hon. Charles J. Bonaparte, Attorney General.

DEAR SIR: I have your favor of March 20th, in which you say, referring to my charges against D. W. Baker, United States District Attorney, for this district, and —— ——, a gentleman occupying an intimate relation with your Department, "If you have any reason to suppose that either of the gentlemen named has transgressed the terms of the President's order, and will give me the details, I will immediately call upon him for an explanation. I do not think, however, that I ought to act merely on a newspaper clipping,
122 and I might add that in the clipping you sent me it does not appear that the officers in question were guilty of inappropriate conduct as above defined, of which, of course, the account may not be sufficiently full to indicate this."

I agree with you that you ought not to act merely upon a newspaper clipping, and that it does not appear from that clipping that the officers in question were guilty of improper conduct as above defined.

Therefore, in order that you may have proper grounds upon which to proceed, I charge and will sustain by proper evidence, that both of these gentlemen have, by scandalous conduct, transgressed both the spirit and letter of the President's order.

Mr. D. W. Baker has taken the trouble to hold me up to the criticism of my fellow citizens by statements he has made on public platform and private conversation, with a view of exciting prejudice against me.

I am personally and financially responsible for any statement I may make, and I trust I shall have the fair treatment, which I have every reason to expect of the office of the Attorney General.

I may add that only yesterday Mr. Baker spent a large part of the day away from his office and at Rockville, most of his time being devoted to an effort, with several other officers, to defeat my candidacy in Montgomery County.

If desirable, I can reenforce my statement by a petition of several hundred lawyers and reliable citizens who concur with me in the

view that the gentlemen named have not only trans-gressed
123 the personal grounds of propriety, so far as the relations of life are concerned, but have lowered the dignity of the Department, under which they are employed.

Very re-pectfully,

Your obedient servant,

B. H. WARNER.

That, in 1907, witness was present at a political meeting at Clarksburg, he was introduced by the plaintiff as the next Congressman from the 6th District; that he was entertained that night by the plaintiff at his home in Montgomery County, and may have asked him to support the defendant for the Congressional nomination and to make speeches in Montgomery County for him, but has no recollection of it, and did not do so seriously—it was a long period ahead, and the subject was not seriously considered there; that he did not at that conversation tell the plaintiff that, if the latter would support him, the defendant would furnish whatever funds plaintiff considered necessary to finance the campaign—that he had never said a word of that kind, and was astounded that plaintiff would make such an allegation; and that he did not do so in the presence of Mr. Hogan, nor did he ask him to inform the defendant what funds he desired—that the defendant had never heard of such a thing; that defendant made another speech at Germantown in October, 1907, before a very small meeting, at which he thinks plaintiff presided; that defendant did not know he was going to preside; that defendant at that time was not a public aspirant, but
124 that he had been talked about for the nomination to Congress; that he had made up his mind to enter the campaign for it; that he may have mentioned to the plaintiff that he was to be a candidate, but has no recollection of saying that it was to his interest to support the defendant, as the President desired his election; that at the conversation at Germantown, he did not say to Mr. Baker that he would furnish him the necessary funds to be distributed to the leaders to work in defendant's behalf and that he did not ask the plaintiff at the meeting there to point out to him the party leaders present, so that defendant could deal with them directly, instead of having plaintiff furnish money to the leaders; that nothing of the sort occurred, and that defendant knew and controlled more leaders than plaintiff did.

The witness further testified on cross-examination that he had learned directly from the witness Purdum, from B. H. Warner, Jr., his son, and directly and indirectly from a number of other people, that the plaintiff acted as manager at the Rockville conference, asked representatives from the different districts what money and other means were necessary to defeat him, and that they were sent out into the hall to get the necessary ammunition or a portion of it; that his son was at Rockville on that day and had reported to him what had occurred there, both as to the county committee and the conferences, and, also, that he had had a "fuss" with the plaintiff, but gave no details of it; that he had received from the same source information that there were in the room, in violation of the spirit

of the Civil Service, postmasters, at least one employee of a
25 department of the Government, and the District attorney,
and that Mr Blair was the paymaster; that, if the money
ad been paid over in the room at plaintiff's suggestion, it would
ave been in violation of certain of the Civil Service Regulations
hich prohibit the giving or paying of money, directly or indirectly,
om one official to another, and Mr. Baker was evidently paying
is money indirectly, if not directly; that this is what witness meant
y his testimony in chief that he regarded Mr. Purdum's being sent
t of the room to receive the money as an effort to get the confer-
ce beyond the range of a Civil Service inquiry; that Sedgwick
as a government employee; that, as to whether plaintiff would
ave been less guilty of violating the spirit of the Civil Service
les by paying the money in the hall than by paying it in the
om, the defendant thought he would be less liable if he went out
the hall—money paid from one to two is less liable to make
uble than when it is paid in the presence of a crowd; that what
meant to say was, there is less liability of their being an infrac-
n of the Civil Service law where the money was paid in the hall
that way than if paid in the room; that the date of his letter to
e Attorney General of March 21, 1908, was a clerical error for
arch 22.

Thereupon, on further cross-examination, the defendant admitted
at he had complained to the Government Printing Office against
e William A. Kroll, because of his activity in the campaign
inst the defendant; that Kroll had desired witness to send him
Allegany County in his interests, which defendant had declined
to do, telling him he was not ready to go into that county.
whereupon, at Kroll's earnest solicitation and importunity,
witness had made several visits to the Government Printing
ice to assist him in getting promoted, and also made an effort to
e him transferred to the Treasury; that he learned that Kroll
going out of his way to work against him, whereupon he called
attention of the Civil Service Bureau to the case, which Bureau,
r investigation, fined Kroll two months' pay; that defendant felt
ly about this, went personally to the Commissioners to ask that
fine be remitted, stating that he had not wished to have Kroll
is family suffer in that way; the Commissioner replied that it
not his first offense, but a case of persistent violation of the re-
rements, that he had been admonished to desist; that witness
objected particularly to Kroll's position as Chairman of a Dis-
Committee from Montgomery County.

hereupon the following ensued:

Q. You had not attempted anything at all involving the enlist-
of his services in your behalf before you discovered that he was
he camp of the other side?

r. DARLINGTON: That is going into a collateral question and
no relation whatever to the one question before the jury; that is,
question of damages involved in this case, and whether compen-
y or punitive.

r. DAVIS: I have already notified the Court and counsel that this
preliminary inquiry.

Mr. DARLINGTON: I insist it is a collateral matter and has already been developed far beyond what would be reasonably proper.

The COURT: I think myself it has gone pretty far, and
127 perhaps if an objection had been entered I would have sustained it. You can ask the preliminary question and then we will see about it. Do you understand the question?

The WITNESS: I do not remember anything except these conferences.

Thereupon the witness further testified that he thinks it was sometime in February or March, 1908, that Kroll voluntarily came to him, though he may have sent him a card. Thereupon he identified a card produced by plaintiff's counsel, addressed to Kroll, postmarked December 27, 1907: "Please come around and see me, if convenient, on Monday evening, about 4.45. B. H. Warner"; also a letter of January 17th, 1908: "Dear Mr. Kroll, come and see me next Monday afternoon if convenient. I will wait for you. With kind regards. Yours very truly, B. H. Warner"; that he presumes Kroll came in response to these communications. He came very often; that defendant had made a little mistake about the date, but could not carry these things in his memory; that it is not his recollection that Kroll did not come to him voluntarily, but in response to defendant's card of December 1907, and that Kroll then proposed to defendant to assist him in the campaign, not only in Montgomery County, but in Allegany County, where Mr. Kroll formerly lived.

"Mr. DARLINGTON: If your Honor please, I am still objecting to all this collateral matter."

Upon further interrogation upon the subject, the defendant further testified that Kroll came to him stating that he had a large
128 acquaintance in Allegany County, and that the card and letter introduced, both, had reference to the promotion he was seeking; that it was absolutely untrue that defendant told Kroll, if the latter would help him in his campaign, defendant would see that he did not lose anything, and would see that he was protected in so far as the Civil Service rules were concerned, as Commissioner Black was a friend of defendant's; there was not a word of truth in it, or that he told Kroll he would see that he got leave of absence from the Government Printing Office, because the Acting Public Printer was a friend of the defendant's; that defendant does not think, and has no recollection that he told Kroll that if he would go in and work for defendant in the campaign, defendant would see to it that his compensation, including what he got from the Government Printing Office and what defendant would give him, would be at the rate of $3.00 per day during the time he was so employed; defendant "had not gotten ready to employ him, and had not asked him to do any particular work for" defendant; that he knew nothing about him, and, if ready, would not have negotiated with him; that defendant knew that Kroll was a classified Civil Service employee of the government.

Thereupon, under the objection of defendant's counsel that it was losing sight of the issue in the case, and was an inquiry into a purely collateral matter, the defendant identified at the request of the

ntiff's counsel, who read it in evidence, a circular letter of the
endant, sent to Kroll under date of March 31st, 1908, saying that
would specially value any support that might be given him at the
nary election on the following Saturday; that the defendant had
been connected with every important movement for the de-
velopment of the National Capital during the past thirty
years; that the interests of the 6th District were closely allied
those of the National Capital; that in view of these facts and
rs, the writer hoped "it would be your pleasure to aid me as re-
sted, and help get out every vote you can"; that this was a gen-
circular letter, sent out by the thousands, without defendant
wing who received them; that the envelope addressing the one
ived by Mr. Kroll was in the handwriting of defendant's
ghter.

n further cross-examination, the defendant testified that March
, 1908, was the first time he had any idea the plaintiff con-
ed the publication of March 28th a libellous article or that it
d be construed in that way; that, in the publication of March
, he wanted to know where the money was coming from,
her from these Government employees or whether it was given
ugh Mr. Pearre or through the plaintiff; that he expected any-
who read the article to answer it, if he dared to do so; that
ublic had a right to expect an answer, and that the defendant
the expectation that either one of the parties mentioned dared
eply to it; that he expected the latter in the public press, would
forward and say where the money was coming from—whether
Baker or anyone else—that he gave them the opportunity to
er it to the public. That he thought it very probable that it
d be answered as he had a right to do, and in which he had
ared for a month in connection with it; that he knew the races
not then going on; that when he printed the article "How about
the race track", he expected to hear from the District Attor-
ney in the papers in response to that advertisement.

Upon re-direct examination, the witness testified that his
nation that the plaintiff had been characterizing the defendant
ass and a fool had called his attention to the plaintiff's unusual
ty, his petty activity in this petty contest, but did not arouse
great indignation on his part; that he had gotten rather accus-
l to that sort of stuff, and does not think that personal senti-
had anything to do with his inserting this article. It is cus-to-
in Maryland to do that sort of thing; that the scandalous
ict mentioned in his letter to the Attorney General was what
dant regarded as his scandalous conduct, in the District Attor-
going into a room in a little country hotel with postmasters
ther officials and assistants, where prohibition was in force,
with delegates and ask how much money or whiskey were
d to defeat or elect a private citizen; that the postmasters at
nson, Gaithersburg, Silverspring and Rockville were present at
ockville Conference, also a man who had been promised a post-
rship at another place, one Warfield, who was a Government
yee, and Horace Sedgewick, a colored employee of the Library

of the House or Senate; that Sc'g-wick is the man who w
ported to have said it would take a lot of money and whisk
defeat the defendant; that, with reference to his letter of Marc
1908, to the plaintiff, which states that the defendant had supp
the plaintiff in his campaign and candidacy, the reference was
candidacy for the County Chairmanship in 1905; that his cand
began in May or June of that year, while his appointme
131 the office of District Attorney occurred in July; that
to that appointment the defendant had supported him;
wards witness urged that it would be improper now for him
appointed to the Chairmanship, and that he thought he ough
withdraw, but defendant's attitude was a passive one of friendli
that he had asked the support of others for the plaintiff's chair
ship before the latter was made District Attorney, but was in
afterwards, though counted on his side, and his son was a co
worker for him; that the provision of the Civil Service law w
he thought might lead to less entanglement through the positi
Mr. Blair in the hall instead of in the conference room, was the
Service Act, providing "No officer, clerk or other person in the
Service of the United States shall, directly or indirectly, give or
over to any other officer, clerk or person in the Civil Service o
United States, any money or other valuable thing that can be ap
to the promotion of any political party whatever". That it occ
to defendant that if the plaintiff sent the parties outside of the
to negotiate with Mr. Blair, there would be less risk under the
similar regulations than if the money was paid out in the room;
before he wrote the article of March 28th, the fact was reporte
him, and was present in his mind when he wrote it, that one Mc
who was co-operating in the effort to defeat the defendant's ca
dacy, was under indictment in the District Attorney's Office, and
he was frequently around that Office, and that he knew there
enlisted in the campaign against his nomination a party or pa
under indictment in this District, which indictment was
132 hands of the plaintiff; that he had no personal acquaint
with Kroll until he came to see witness; that he first lea
that he was from Allegany County from Kroll himself, when
came to defendant to help him in his campaign.

"Mr. DARLINGTON: Under the condition of the issues in this
I think I have no further witness."

Thereupon, in rebuttal, the plaintiff called as a witness on
behalf the said WILLIAM A. KROLL, who testified that he had
ceived the defendant's card of December 28th, 1907, and Janu
17th, 1908, and over the objection and exception of the defend
that the cross-examination of the latter with reference to the wit
Kroll was purely a collateral matter, as to which his answers w
conclusive, he testified that he called upon the defendant in respo
to the postal card of the latter, and that he had never visited
defendant's office before so calling.

Thereupon, plaintiff's counsel announcing that the evidence
the witness Kroll in rebuttal was "distinctly offered for the purp

of contradicting Mr. Warner, to show that this was the first time that Kroll had ever called at Mr. Warner's office, and that Mr. Warner sent for a classified Civil Service employee and solicited his active aid in the forthcoming campaign," the following occurred:

By Mr. HOGAN: Had you ever visited Mr. Warner's office before?

Mr. DARLINGTON: I object.

The WITNESS: I had not.

The COURT: I think he can answer that question.

133 I take an exception. My objection is based on the grounds already stated, that it introduces a contradiction on a collateral matter, which is incompetent.

And the said exception was allowed and duly noted.

Thereupon plaintiff's counsel propounded the further question to the witness Kroll:

"Q. Tell us in substance, just exactly what occurred on the occasion of that visit.

"Mr. DARLINGTON: I object.

The COURT: Mr. Darlington, do you object on the ground that it is collateral?

Mr. DARLINGTON: Yes; that it is a collateral inquiry, leading us into issues not raised by the pleadings, and necessarily confusing.

The COURT: The only question is whether it reflects upon the credibility of the witness.

Mr. DARLINGTON: If it does, the authorities are uniform to the effect that a collateral question cannot be gone into for that purpose."

Whereupon, after discussion, the court said:

"The question in my mind is whether it is a collateral question, and I am inclined to think it is not. The gist of this whole controversy now is as to the intent of the defendant in this cause when he wrote this article. That being so, any evidence that reflects upon that intent is admissible evidence, because it goes directly to the point at issue. * * * One of the ways of judging whether an intent is honest or not is whether a man lives up to it. Intent is the question at issue, and if you can show that a man talks one

134 way and acts another, then surely that is admissible evidence to pass upon the question of the accuracy of what he says, the truth of what he says. * * * The defendant has given his version of the transaction, the reasons for it. The plaintiff in the case challenges those reasons, and he seems to me to have the right to say to the jury "This is the reason stated. We give you acts which we think are inconsistent with those statements. It is for you to pass upon the truth of the intent." I think it is admissible.

Mr. DARLINGTON: Your honor will allow me an exception upon the ground as stated, and upon the further ground that it is allowing the jury to make inferences upon inferences. First they must assume that Mr. Warner is not consistent in his attitude in criticising Mr. Baker about the Civil Service; and, second, they must infer from that inference that he had some other motive."

Thereupon, subject to the defendant's said objection, the witness

testified that he had called at the office of the defendant, saw him personally; that defendant referred to his campaign against Congressman Pearre, and proposed that the witness assist him in Montgomery County, and that he would also like him to go to Allegany County and work on his behalf; that he would see that witness did not lose anything and that so far as the Civil Service was concerned defendant would see that he was protected, Chairman Black of the Civil Service Commission being a personal friend of the defendant's, and that he would see to it that the witness got leave from the Printing Office, the Deputy Printer being, also, a personal friend of his.

135 Mr. DARLINGTON: If your Honor pleases, it is understood that each of these answers goes in under my objection and exception.

The COURT: Of course, and for the reasons assigned.

And, under like exception and objection, the witness further testified that the defendant told him he would pay him the difference between his wages, which were $2.80 per day, and $3.00 per day during the time witness was working for him.

Upon cross-examination, the witness Kroll testified that he had known the defendant since 1906, having met him once in that year, and that he next met him on December 30th, 1907 at defendant's office, where he had gone at defendant's request as certified to by witness; that he did not recall having applied to Pearre as early as March 1906 to induce him to get the Warners, or one of them, to assist him in being promoted; that this is as definitely as he can answer; that, from his communications with Pearre, he thinks the solicitation of the Warners to assist the witness to secure promotion was a matter between Pearre and the Warners somewhere in 1906; that he is not prepared to say how defendant learned that witness was from Allegany County, but it was not from witness first.

Thereupon the plaintiff, in rebuttal, testified that he was present at a political meeting in October, 1907, at Clarksburg, when the defendant made a speech, at plaintiff's invitation, and at Germantown a week later in the same month; that plaintiff was then United States District Attorney, presided at the meeting and intro-

136 duced the defendant. That the defendant asked to be introduced as the next Republican Congressman from the 6th District, but that plaintiff said "I cannot do that, because I might commit myself," and offered to introduce him as the next Republican Governor of Maryland; that the defendant asked witness to point out the leaders, that he wanted to give them a little money, or he said he would give the money to witness and have him give it to them. This is what he said first, and witness said he could not do that, and defendant said "Well that is so, you are a Government official. If you will point out the leaders to me, and introduce me to them, I will call them outside and give them a little money." Witness said he could not do that; that at witness' home in Germantown, the Sunday following the Clarksburg meeting, defendant asked witness to go to the election district of Montgomery County and make speeches in his behalf against Col. Pearre, and that, if the

plaintiff would support him, he would furnish the funds for plaintiff to finance the campaign.

"Mr. DARLINGTON: It is understood that my objection goes to each of these questions.

The COURT: Yes."

On cross-examination the plaintiff testified that defendant was a guest at his house the night after the day spent at Clarksburg; that the next morning he said to witness and Mr. Hogan that he wished them to go into every district in Montgomery County to aid defendant in 1908, when he was a candidate for Congress; plaintiff told him he did not wish to commit himself until he knew whether Col. Pearre was going to run; he said something about having been in some campaigns, something about expense, to which defendant replied "You need not bother about expense. I am willing to put up the money if you will support my contest;" that witness was just putting him off, because he believed then Pearre would run for Congress, and intended to support the latter; witness said "You know Mr. Warner, campaigns are expensive; was to a certain extent jollying him along; that at neither the Germantown nor the Clarksburg meeting did witness introduce defendant as the next Republican candidate for Congress, or the coming Republican candidate for Congress; but that in introducing the defendant to the meeting witness said of defendant: "It is reported he is going to be a candidate for Congress next year;" that at the Germantown meeting witness told him he could not point out the leaders; witness did not tell him because he was not supporting him, and did not want him to get next; there were probably less than 25 persons present at that meeting, all colored people.

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Thereupon, in surrebuttal, JOHN T. SMITH and RANDOLPH H. WINDSOR, witnesses called on behalf of the defendant, testified that they were present at the political meeting in the Clarksburg District in the fall of 1907, at which the plaintiff presided, and at which the defendant made a speech, and that the plaintiff introduced the defendant as the coming candidate for the Republican nomination to Congress from the 6th Maryland District.

Thereupon the witness WILLIAM A. KROLL being recalled for further cross-examination, stated that he attended at the office of Mr. Esterly, the Auditor for the State and other Departments, in the City of Washington, in February 1908, in so far as he could recall; that he was there alone, and was never there in his life with the defendant, and that he was not at the office of Mr. Esterly in September 1907.

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Thereupon the defendant, in sur-surrebuttal, testified that he had one with the witness Kroll to the office of Mr. Esterly, and that, on the day that he did so, he met Kroll at his, defendant's, office.

Thereupon GEORGE W. ESTERLY, called as a witness on behalf of the defendant, testified that he was Deputy Auditor at the State and other Departments in the latter part of 1907; that there was a vacant clerkship in his office, in connection with which the witness Kroll called to see him in September or October, 1907; that the occasion was just before witness went on a trip to North Dakota, which was on October 8th, and that it is witness' recollection that Mr. Warner accompanied and introduced Kroll to witness.

Thereupon, foregoing being all the evidence in the case necessary to explain the bearing of the ruling upon the issues on questions involved, the defendant, by his counsel, moved the court to direct a verdict for the defendant on the ground that no basis is laid in either the inducement or averment, or the colloquium, of the declaration under which the meaning attributed to the article of March 28th can be found from it, and, particularly, because there is not found in either the inducement or the colloquium any allegation that the Jockey Club, or the bookmakers, or the other persons interested in gambling at the race track were sources from which the plain-
139 tiff, by reason of his official position or otherwise, might unlawfully or improperly obtain money, nor any allegation that the words complained of were written or published with reference to any illegal or improper obtaining of money by the plaintiff from the race track, jockey club, bookmakers or other persons interested in the race track, or that the words were written with reference to the non-prosecution of the race track gamblers, or any other official non-performance of duty by the plaintiff, or that the words were written with reference to the obtaining of money at all, or with reference to the jockey club, its race track, or any race track gamblers, all of which averments, though essential to be contained in the inducement or colloquium, were left entirely to the innuendo, which is not the subject of proof, is not traversible, and is incapable of construing or eking out the cause of action; but the court after argument declined to grant the said motion, and overruled the same, to which action of the court the defendant by his counsel then and there duly excepted.

Thereupon the plaintiff requested the court to grant the following instruction:

"1. If you find from the evidence that at the time of the publication of the article described in the declaration the following were facts, namely:

(1) the plaintiff was United States Attorney for the District of Columbia;

(2) there was in said District a race track at which were being had races of horses;

(3) at that track betting or making wagers on the results
140 of said races was being carried on;

(4) it was believed or claimed by some that the said betting or laying of wagers, or the permitting of the same, could be prevented by the prosecution in that behalf by the plaintiff as such District Attorney of the persons engaged in or permitting the said betting or laying of wagers;

(5) the plaintiff in fact did not prosecute the said persons or any of them;

(6) the defendant was engaged in a contest in the County of Montgomery, State of Maryland, for nomination as a candidate for the office of Representative in the Congress of the United States from the Congressional District embracing said County;

(7) his opponent in said contest for such nomination was the certain Pearre, in the said article mentioned;

(8) in the said contest the plaintiff supported the candidacy of the said Pearre and opposed that of the defendant; and

(9) the defendant wrote and procured the publication of the said article;

Then you are instructed, as matter of law, that the said article is libelous and that your verdict should be for the plaintiff, and that the only question for your determination is what amount of damages the plaintiff is entitled to recover of the defendant by reason of the publication of the said article." To the granting of which instruction the defendant objected, by his counsel, on the ground that the court, at the instance of the plaintiff, having
141 ruled that the article described in the declaration was *libelous per se*, and having excluded any and all evidence on behalf of the defendant upon that issue, the instruction required the jury to find nine different findings of fact, as to which the defendant had, under the said ruling of the court, been permitted to offer no evidence, and to determine upon these findings of fact the question whether the article was *libelous per se*, whereas the court had already held it to be so; but the court overruled the said objection, and granted the said instruction, to which the defendant then and there excepted, which exception was allowed by the court and duly noted upon its minutes.

Thereupon the plaintiff prayed the court to grant the following instruction:

2. "If you find that the article mentioned in the declaration was composed and its publication procured by the defendant, then you are instructed that from the publication of such article, the law implies malice on the part of the defendant, and that, without regard to whether there was any actual malice on the part of the defendant in preparing and having published the article in question, the plaintiff is entitled to recover compensation for the injury done to his reputation by the tendency of such publication to bring him into disgrace and di-repute among those who knew him personally or by reputation, and for the mental suffering (if you find that he has so suffered) caused by such publication."

To the granting of which prayer the defendant, by his counsel, then and there excepted, on the ground that it assumes that
142 injury had been done to the reputation of the plaintiff by the tendency of the publication to bring him into disgrace and disrepute among those who knew him personally or by reputation, and did not limit the same to such injury "if any, as was shown by the testimony"; but the court overruled the said objection, and granted the said instruction, to which ruling of the court the de-

fendant duly noted an exception, which was allowed and
entered upon the minutes of the court.

Thereupon the plaintiff requested the court to instruct the j
as follows:

3. "If you find that the defendant composed and published
article mentioned in the declaration, and further find that he did
wantonly, or in reckless disregard of the rights of the plaintiff,
of the injury likely to result to his reputation from the publicat
of the said article, you are instructed that in reaching your verd
you will not necessarily be limited to awarding such damages as y
may find will fairly and reasonably compensate the plaintiff for s
injury as the evidence shows him to have received by reason of s
publication; but you may, in addition thereto, assess against the
fendant, by way of punishment to him and as an example
others, such damages as, in your sound judgment, under all
circumstances as disclosed by the evidence in the case, you beli
the defendant ought to pay."

To the granting of which the defendant by his counsel then a
there objected, on the ground that it instructed the jury that th
might add, in addition to such damages, if any, as th
143 might award for the punishment of the defendant, additio
damages for the purpose of deterring others; but the co
overruled the said objection, and granted the said instruction, whi
action of the court the defendant then and there duly excepted
which exception was allowed and entered upon the minutes of t
court.

Thereupon the plaintiff further prayed the court to instruct t
jury as follows:

4. "If you find from the evidence that the article sued on was fa
in respect of the charge against the plaintiff, made and conveyed
it, and that, in addition to its so being false, it was composed a
procured to be published by the defendant with reckless indifferen
to its truth or falsity, or in reckless or wanton disregard of the rig
of the plaintiff and the injury likely to be done the plaintiff by
publication, you will be justified in finding that, in composing t
said article or procuring it to be published, the defendant was
tuated by actual malice; but in determining whether he was so
tuated you should consider all of the testimony in the case, inclu
ing that of the defendant himself; and, if you find that he was
actuated, you may include in your verdict, in addition to such da
ages as you may find fairly to compensate the plaintiff such other a
further damages as, in your opinion, may be proper as a punishme
of the defendant and as an example to him and others in respect
composing and publishing such or similar articles in the future; an
in determining whether the said article was composed and procu
to be published with reckless indifference or in reckless
144 wanton disregard, as aforesaid, you should consider the
quaintance and relation of the parties respectively, their fe
ings towards one another, the occasion of the publication of the sa
article, the personal interest, if any, of the defendant in any of th
matters mentioned or referred to therein, the mode and extent of th

publication, and all the circumstances surrounding and attending the same, including the means and opportunity of the defendant, by the exercise of reasonable care in that behalf, to have ascertained the truth or falsity of the said article, and the presence or absence of probable cause therefor in advance of its composition and publication." To the granting of which instruction the defendant by his counsel objected and took an exception, which was duly allowed by the court and entered upon its minutes, on the ground stated with reference to the immediately preceding instruction, and, also, because there was no evidence that the defendant failed to use any and all means and opportunity to ascertain the truth or falsity of the article in the sense which, under the testimony in the case, he intended to be put upon it.

Each of the foregoing instructions was granted by the court over the said objection and exception of the defendant thereto, severally.

Thereupon the defendant requested the court to grant the following instruction to the jury:

1. "The jury are instructed to return a verdict for the defendant", to which instruction the plaintiff objected, and the court sustained the said objection, and rejected the said instruction, to which action the defendant then and there duly excepted, which exception was allowed and entered upon the minutes of the court.

145 Thereupon the defendant requested the court to grant the following instruction to the jury:

2. "If the jury believe from the evidence that the true intent and meaning of the reference to the race-track contained in the defendant's article published in the Washington Herald March 28, 1908, was to inquire what the complainant was doing or intended to do about the operations of the so-called bookmakers then in progress at the Bennings race track, and to suggest or complain that the plaintiff's time and attention should be directed to the prosecution of the said bookmakers and to the suppression of their said operations rather than to the part he was taking in the contest for the Republican nomination to Congress in Montgomery County, Maryland, that the said intended comment and criticism were fair and reasonable under the conditions then existing at the said race-track and the operations of the bookmakers then being carried on there, and that the intent and meaning of the said article was not to charge or intimate that the defendant was obtaining or seeking to obtain money for the said contest against the defendant from said bookmakers or other persons connected with the said race-track, in consideration of the plaintiff's failure to prosecute them or to interfere with their said operations, their verdict should be for the defendant", but the Court, under the objection of the plaintiff, rejected the said instruction, to which action of the Court the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

146 Thereupon the defendant requested the court to grant the following instruction to the jury:

3. "The jury is instructed that, whether or not the plaintiff was correct in his view that the decision of the court in the Walters case

tied his hands, or rendered it impracticable and improper for him to attempt further proceedings against the so-called bookmakers at the Bennings race-track until the Walters case had been heard on appeal, the defendant, in common with the public generally, had the right to entertain, and to express in the newspapers, the contrary view, and to criticise or comment upon the plaintiff's inactivity in that regard, if the jury shall further find from the evidence that there was reasonable ground for difference of opinion upon the question whether the plaintiff's hands were in fact tied, and whether it was in fact necessary or proper for him to refuse warrants against the so-called bookmakers in a further attempt to suppress their operations at the said race-track, and provided such criticism or comment was fair and reasonable, under the circumstances shown by the evidence", but the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there duly noted his exception, which was allowed by the court and entered upon its minutes.

Thereupon the defendant requested the court to grant the following instruction to the jury:

4. "As to that portion of the article published in the Washington Herald of March 28, 1908, set forth in the declaration, which refers to the plaintiff as having gone to Rockville "to attend a con-
147 ference of Mr. Warner's enemies, and determine what ammunition was needed to defeat him", the jury are instructed that it is for them to determine whether the words in question were intended to mean, as alleged in the innuendo, that he entered into the said conference for the purpose of determining how the necessary funds should be raised, to be used in the campaign on behalf of Mr Pearre against the defendant, or whether, as is contended by the defendant, the said words had reference to the inquiry at the said Rockville conference as to how much money and what other means were necessary to defeat the defendant in the different election districts of Montgomery County", but the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there duly noted his exception, which was allowed and duly entered upon the minutes of the court.

Thereupon the court granted the following instruction on behalf of the defendant:

5. "If the jury believe from the evidence that the true intent and meaning of the defendant, in his reference to the race-track, contained in the article published in the Washington Herald of March 28, 1908, was to inquire what the complainant was doing or intended to do about the operations of the so-called bookmakers then in progress at the Bennings race-track, and to suggest or complain that the plaintiff's time and attention should be directed to the prosecution of the said bookmakers and to the suppression of their said operations rather than to the part he was taking in the contest for the Repub-
lican nomination to Congress in Montgomery County, Mary-
148 land; that the said intended comment and criticism were fair and reasonable under the conditions then existing at the said race-track, and the operations of the bookmakers then being carried

on there; and that the intent and meaning of the defendant in publishing the said article was not to charge or intimate that the plaintiff was obtaining or seeking to obtain money for the said contest against the defendant, from the said bookmakers or other persons connected with the said race track, in consideration of the plaintiff's failure to prosecute them or to interfere with their said operations; and shall further find that the defendant was not guilty of *actual* malice as hereinafter defined, *in the instruction given by the Court*, the plaintiff is entitled to recover such sum, and such sum only, as the jury shall find from the evidence will be fair and just compensation to him for the damage sustained by him in consequence of the publication of the said article."

Thereupon the court, of its own motion, granted the following instruction:

"By actual malice, or malice in fact, as that expression is used by the Court, is meant either personal hatred or ill-will of the defendant towards the plaintiff *which is the motive of the act of the defendant* or a wanton disregard by the defendant of his civil obligations towards the plaintiff, or a reckless indifference by the defendant to those obligations. It does not mean only such personal hatred or ill-will, but it may exist where, without regard to such hatred or ill-will on the part of the defendant, his act was committed under such circumstances as to manifest a reckless or wanton indifference to the possible effect of the act upon the plaintiff and his civil rights, and particularly his right to his good reputation."

Thereupon the case was argued to the jury, in the course of which gument counsel for the defendant read the article of March 30th, hich had been introduced in evidence, and said:

"Why, on the very next secular day, before Mr. Warner knew that is construction was being put upon his article of March 28th, there llowed this article of the 30th showing very clearly what he meant, the same connection, and referring to this same conference, he s: 'Why don't the district attorney stay in Washington and prose-e these race-track gamblers, instead of spending his time in Maryd politics?' The article sued on was published on Saturday, and s article was published on Monday, and without any knowledge on Warner's part, if his testimony can be believed, of what was imed to him, he caused to be published a further article showing at he meant.

* * * * * * *

I forgot to say that on the very next secular day, passing Sunday, e this further article upon this same subject of what the defend thought was the undignified conduct of the District Attorney in part he took in this matter, and which shows, if you believe his imony, that up to this time it had not occurred to him that the guage could be understood in the other sense. * * * * My friend says this is a self-serving declaration. The term 'self-serving declaration' is a legal phrase, which means a thing a man says in his own favor. If you believe what Warner swears to, that up to this time he had never had in his own

mind that other construction, then this is not a self-serving declaration, trying to explain away or diminish anything he had said before. He is pursuing the same subject, and says what he means—'How about the race track?'

"If, on the other hand, it is a self serving declaration, taking my learned friend's view, then here, two days afterwards, he is showing that he did not mean what it is claimed he meant. He had not been given the opportunity expressly to disclaim it, but if you disbelieve his testimony, that he did not know what construction was being put upon it, you find that two days afterwards he was showing that he meant something very different, and an equivalent of the explanation."

Thereupon, in the closing argument of the counsel for the plaintiff, referring to the said article of March 30th, the following occurred:

"Mr. DAVIS: The inquiry of this publication was, "why not stay at home and prosecute the race track scandal?" "why not stay at home and close the race track scandal?" That is what the article says and that is why we put it in. Why not stay at home and try to close the race track scandal? namely, the scandal I exposed in the article of March 28.

Mr. DARLINGTON: I object. The Court, on objection of Mr. Davis, refused to allow Mr. Warner to explain what he meant by this article of March 30. Mr. Davis objected that the article was not libelous, and the court excluded the explanation on that ground. Counsel is now arguing that the article was libelous.

151 "Mr. DAVIS: My distinguished friend argued, before recess, that the meaning of this article should be considered by the jury as shedding light upon the meaning to be given to the former article, and was in line with his construction, and with his declared reason for publishing it. I say that the words he spoke here, 'why not stay at home and close the race track scandal' are not words that express the meaning of the article in the issue of the Washington Herald of March 30th, and I say I have the right to say to the jury that in using the expression, 'why not stay at home and close the race track scandal' he could not have had it in mind to give any such meaning to the article of the 28th as is now insisted upon as a defense against punitive damages in this case.

"Mr. DARLINGTON: Counsel has said, in substance, that these words mean, 'Why not close the race track scandal?' We offered to explain that, and on the objection of counsel we were not allowed to do it, on the ground that it was not libelous. I submit that the remark should be stricken out and the jury instructed to disregard it.

"Mr. DAVIS: I submit that as counsel undertook to give a meaning to those words, when he was on his feet, which he said was in support of the defendant's testimony as to his meaning and intent in the article of the 28th, I have a right to say that it does not bear that meaning and it cannot bear that meaning.

"Mr. DARLINGTON: A non-libelous meaning?

"Mr. DAVIS: I take the judgment of the Court, however.

152 "The COURT: I think that inasmuch as Mr. Darlington gave the article a meaning in connection with the intent

e defendant in this case, taking the words of the article itself, that e plaintiff would be justified in undertaking to give his version it, and let the jury decide which is the meaning it properly bears.

"Mr. DARLINGTON: Although he is now arguing that they are elous? Although on objection he argued they were not libelous, d on that ground explanation was excluded, he is now allowed to gue that they are libelous?

"The COURT: I do not think that they are libelous. I do not know t he can argue that they are libelous.

"Mr. DARLINGTON: That is why I am objecting to his putting onstruction upon them which makes them libelous.

"The COURT: They might only be libelous under certain conditis, and not libelous from the words themselves. He is taking words and says to the jury that they do not bear the meaning t you gave them.

"Mr. DARLINGTON: But do mean——

"The COURT: But do mean this, which he applies to the testimony the case. If it is fair for one it is fair for the other. He cannot that they are libelous, and the jury would not be entitled to bring in as an additional liability; but as you have already commented n the article in reference to the testimony in the case and the intent of the defendant in this case, surely it is but fair that the other side should then have the right to say that they cannot bear that meaning, and to criticize the intent.

"Mr. DARLINGTON: To make my point plain. My point is That we, having been refused the privilege of explaining what eant by that article, and the intent and meaning of it, on the tiff's own objection, and the Court having sustained the objec on the ground that this article is not libelous, the fact that I ed the meaning of that article upon its non-libelous construc and intent, does not give the plaintiff the right at this point to that it has a meaning which is corroborative of his construction.

"The COURT: I think Mr. Davis is entitled to make the comment e meaning of the article.

Mr. DARLINGTON: That he is entitled to make the comment he ade?

e COURT: Not as a part of the libel in suit, but as relating to the with which the paper was published and the action of the de nt in publishing it. I overrule your objection.

DARLINGTON: I have my exception?

he COURT: Yes."

hich exception of the defendant to the refusal of the court to out the said portion of the plaintiff's closing argument, and truct the jury to disregard it, was duly entered upon the min f the court.

reupon the Court charged the jury as follows:

"Gentlemen of the jury, you have been warned, as the case has progressed, to keep your minds absolutely clear and un biased by anything that has occurred in the course of the trial cause, until it was finally closed, and it became your duty to on the evidence. That time has now come. The case is placed r hands for your finding.

It would be useless for the court to suggest to you the charac
of the case, any more than to say that the plaintiff has charged
defendant with having published an article concerning him, and
Court says to you, as a matter of law, that the words printed a
published, as they have been offered in evidence before you, con
tue, in law a libel upon the plaintiff in this case by the defenda

Other matters which have been offered here in the first prayer
the plaintiff, have either been conceded, or, if not conceded, th
is no dispute in respect of them, so that the Court feels justified
saying to you that although it submits this first prayer for you
find certain things, those certain things have all been agreed to
conceded so far as a fact may be conceded, their finding as a mat
of law, of course, not being conceded by the defendant. As to th
the Court says that the words published are libelous per se, that
libelous in themselves, and that the plaintiff is entitled to recover
this case. So that you simply have before you, therefore, the qu
tion of damages.

There are two kinds of damages in this case and you may fi
either of the two, or both. First is what are termed compensato
damages. That is, you may find for the plaintiff such damages
in your judgment, will compensate him for whatever inju
155 has occurred to him by reason of this libel, published as s
gested in this case. In other words, the whole question
compensatory damages, is to give to the plaintiff such damages
you think will compensate him for whatever injury you may fi
from the testimony in the case, he has endured, whether the inju
be to his feelings to his character or what not. You are entitled
give compensation for that, if you think he has suffered. The l
implies that he has suffered, at least to the extent of finding a verd
in favor of the plaintiff for damages. The amount of those damag
you are to consider, from all of the circumstances of the case; a
when you have found, from all the facts in the case, what you thi
will compensate the plaintiff for the wrong done him by the publi
tion of this libel, that it will be your duty to find. That is wh
compensatory damages are.

But there is another character of damages that you may find
this case, and that is what are know as exemplary damages, or pu
tive damages, sometimes called smart money; in other words, da
ages which a jury may find as a punishment to a man who mal
nously publishes a libel upon another man, not only as a punishme
to the man himself who unjustly and maliciously publishes t
libel, but also as a deterrent to other men, so that they will n
without just cause, publish about another anything which is n
true, or which is libelous per se, as I have stated.

That being so, the real question in this case for you to consid
upon all the testimony is whether the plaintiff is entitled
156 only compensatory damages, or is likewise entitled to pu
tive damages. The Court says to you that he is entitled
compensatory damages. It allows you to find, from all the eviden
in the case, whether he is likewise entitled to punitive damages.

After the court's ruling that these words are libelous per se, th

defendant has stated, through his evidence in the case, that the plaintiff in this case is not entitled to punitive damages because there was no purpose on the part of the defendant in this cause to injure the plaintiff; that in writing these words he was not actuated by any malice; that he was not negligent or wantonly reckless and indifferent, or, in other words, that when he wrote these words, there is no evidence of any malicious intent or any actual malice on the part of the defendant in this case in the use of the written words. So that the real crucial test therefore comes under those conditions.

The law that governs you in respect to the question of damages is contained in the second, third and fourth prayers, which I shall read to you. The fact is that all of the prayers deal with this question, except the first:"

Whereupon the court read to the jury plaintiff's second prayer (Bill of Exceptions p. —), and continued as follows:

"In other words, that the publication of this article implies malice in law, and then that malice follows the publication without regard to whether there was any actual malice on the part of the defendant in preparing and publishing this article.

The plaintiff is therefore entitled to recover compensation for the injury done his reputation by the tendency of such publication to bring him into disgrace and disrepute among those who knew him personally or by reputation, and likewise for any mental suffering, if you find that there was mental suffering, by reason of the publication. That is called compensatory damages, and he is entitled to such sum as you may find will compensate him for the suffering and for the disgrace, if you find that there was any."

Thereupon the court read to the jury the plaintiff's third prayer (Bill of Exceptions p. —), and continued:

"That is, if you find that the defendant wantonly or in reckless disregard of the plaintiff's rights and of the injury likely to result from the publication, published this article, then in addition to compensatory damages you may add the punitive damages; that is, such damages as, in your judgment, you may think sufficient to punish the defendant for having published this article, under the circumstances set out in this prayer."

Whereupon the Court read to the jury the fourth prayer of the plaintiff (Bill of Exceptions p. —) and continued as follows:

"In other words, in considering this question as to whether there was actual malice in this cause, you have a right to consider every thing that has been introduced in the case by testimony—all of the surrounding circumstances as they have been brought out in the case. In other words, you are to take the entire environment in this cause as it has been brought before you by the testimony, and all of the circumstances of the evidence which has been offered, before you can determine the question as to whether or not there was actual malice.

In that connection, as I have stated to you, the defendant being barred from showing that the words were not actionable, or were not libelous per se, and the court having so decided, the defendant

has offered testimony tending to show the intent and purpose in publishing the article, as reflecting upon the question of punitive damages only. You will understand that no matter what the intent may have been of the defendant in this cause, in publishing these words, it does not exempt him from compensatory damages which you may find the plaintiff is entitled to in this cause; but his intent does reflect upon the question of exemplary or punitive damages, and to that feature of the case this prayer is applied."

And thereupon the court read to the jury the defendant's third prayer (Bill of Exceptions p. —) and continued:

"I shall now read what the instruction of the Court is as to what 'malice' means."

'In considering the question as to whether or not the plaintiff is entitled to punitive damages in this case, you are to consider all of the testimony in the cause. If you find that the explanation of the defendant in this cause, of his purpose and intent in publishing this article is correct, and do not find that there is any actual malice on his part in publishing it, then the plaintiff is entitled, in this cause, only to compensatory damages and not to exemplary damages.'

159 Now what is malice?

'By actual malice, or malice in fact, as that expression is used by the court, is meant either personal hatred or illwill of the defendant towards the plaintiff which is the motive of the act of the defendant or a wanton disregard by the defendant of his civil obligations towards the plaintiff, or a reckless indifference by the defendant to those obligations.'

If the defendant had a wanton disregard of his civil obligations towards this plaintiff, or has a reckless indifference to the obligations, that would be malice in fact.

"It does not mean only such personal hatred or illwill, but it may exist where, without regard to such hatred or illwill on the part of the defendant, his act was committed under such circumstances as to manifest a reckless or wanton indifference to the possible effect of the act upon the plaintiff and his civil rights, and particularly his right to his good reputation."

So that you may see that malice not only may mean personal illwill or hatred of one person to another, which dictates the act; but it may be the wanton disregard of the rights of that person and negligence in his acts toward that person, which may amount to malice. That is what we talk about, when we talk about actual malice in any given case, and as in this case defined.

It does not seem to me, gentlemen, that there is any need of a more full description of the various questions, because they are
160 confined, in this case, practically to the question of damages, and as to whether they should be compensatory or whether they should be punitive or both.

The case deserves your most careful consideration, without any feeling that may have been begotten by the earnestness of counsel in this case one way or the other. You have nothing to do with that. You are to decide the case according to the law and the evidence—according to the law as it is given to you, and according

to the evidence as it has fallen from the lips of the witnesses. You are to decide it, of course, without any passion one way or the other. You must not be unmindful of the importance of the case, as all cases are important that come before a jury in any tribunal, because they involve the rights of the people. As long as any right is involved, it is deserving of the most careful consideration by a jury.

So in this case, on the one hand, there is before you the question as to whether or not punitive damages shall be given, or whether the motive in publishing this article was one of fair and just comment of a public official. If it was so intended, and if from all the evidence in this case you find that the purpose of this article and its publication by this defendant was for the purpose of just and fair criticism of a public officer, that ought to be considered by you in respect of this question of compensatory damages; and if you find it to have been dictated by that motive only, and by no idea of actual malice, then you could not find and should not find punitive damages in this case.

On the other hand, a public officer is an officer of the people, upon whose integrity and high character the community largely
161 depends for the preservation of the law. While just criticism is proper and right and should be invited by the public of any of its officers, as it is helpful to the public and it may be helpful to the officers themselves; yet, on the other hand, if a man unlawfully and without warrant goes to the extent of libeling a public officer without warrant and without excuse, it is unjust criticism.

So that whatever you may find in this case, it is one of importance and it is one that demands careful consideration of you as jurors. It demands that you should be impartial and not be influenced either by prejudice or illwill or anything else that may have cropped out either in you or in those engaged in the trial of this cause. You stand as the arbiters between the plaintiff and this defendant, to decide this case according to the evidence alone.

Your verdict, as you know, must be unanimous and there can be only one verdict in the case. Your verdict must be for the plaintiff, and the question that you are to pass upon is what shall the amount of that verdict be. Of that you are the sole judges. You have the sole right to say what damages have been sustained by the plaintiff in this case. So that when you are called you will announce your verdict for the plaintiff and the amount that you find he is entitled to under the law and the evidence in the case."

Each of the exceptions taken by defendant, as set forth in the foregoing bill of exceptions, was taken severally, and was duly noted by the court on its minutes at the time, and before the jury retired to consider their verdict.

And, because the matters hereinbefore set forth are not
162 matters of record, and because the defendant desires to have the same so made of record, so that he may have this case and the rulings therein considered and heard on appeal by the Court of Appeals of the District of Columbia, he requests the justice presiding to sign and seal this, the defendant's bill of exceptions, and tenders to the justice presiding this, his bill of exceptions, praying that the same may be signed, sealed and made a part of the record, according to the statute in such case made and provided, which is

accordingly done, now for then, this 29th day of November, A. D. 1909.

HARRY M. CLABAUGH. [SEAL.]

Settled by Consent.
H. E. DAVIS,
FRANK J. HOGAN,
Attorneys for Plaintiff.
J. J. DARLINGTON,
Attorney for Defendant.

Directions to Clerk for Preparation of Transcript of Record.

Filed December 1, 1909.

In the Supreme Court of the District of Columbia.

No. 50411. At Law.

DANIEL W. BAKER
vs.
BRAINERD H. WARNER.

It is hereby stipulated by the parties to the above entitled
163 cause, by their respective attorneys, that the parts of the original proceedings in this cause to constitute the transcript of the record on appeal to the Court of Appeals shall consist of the declaration, the plea, the joinder in issue, the bill of exceptions, the motion in arrest of judgment, the order overruling the motion in arrest and the judgment of the court in said cause rendered, and the citation and acceptance of service thereof; memo. of filing supersedeas bond.

H. E. DAVIS AND
F. J. HOGAN,
Attorneys for Plaintiff.

164 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 163, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50411 at Law, wherein Daniel W. Baker is Plaintiff and Brainerd H. Warner is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of December, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2102. Brainerd H. Warner, appellant, vs. Daniel W. Baker. Court of Appeals, District of Columbia. Filed Jan. 4, 1910. Henry W. Hodges, clerk.

Friday, January 6th, A. D. 1911.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

The argument in the above entitled cause was commenced by Mr. J. Darlington, attorney for the appellant, and was continued by ...rs. H. E. Davis and F. J. Hogan, attorneys for the appellee, ...l was concluded by Mr. J. J. Darlington, attorney for the ap...ant.

In the Court of Appeals for the District of Columbia.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER, Appellee.

Opinion.

(Mr. Justice Van Orsdel delivered the opinion of the Court:)

This is an appeal from the judgment of the Supreme Court of ...District of Columbia in an action of libel, in which the appel... was defendant. For convenience, the appellant will be referred ...ereafter as defendant, and appellee as plaintiff. The alleged ... consisted of an article published by defendant in The Wash...on Herald of March 28, 1908. It is claimed that it in substance ...ged plaintiff with the crime of receiving money for political ...oses in consideration of his refraining from prosecuting alleged ...tions of the gaming act of the District of Columbia.

...he declaration is in two counts, which differ only in the innu...

In each count it is averred in the indictment and colloquium ... the plaintiff, at the time of the publication of the alleged ...us article, and prior thereto, was the United States District ...rney for the District of Columbia, charged with the duty of ...ecuting violations of law within said District, and that, at the ... the article was published, horse races were in progress on the ...ds of the Washington Jockey Club, at which bets or wagers ...being made upon the results of the races. Plaintiff's failure to ...ed criminally against the race-track gamblers is explained in ...eclaration by the fact that prior thereto he had prosecuted one ... Walters upon the charge of setting up a gaming table at the ...ace course, in which cause a demurrer to the indictment had ...sustained by the Supreme Court of the District of Columbia, ... which decision plaintiff was prosecuting an appeal in this

court; and that, inasmuch as the law had been judicially construed, he had decided not to issue warrants or make presentments to the grand jury in other cases, pending the determination of the appeal.

It is further alleged that the defendant was a candidate for the Republican nomination to Congress from the Sixth Congressional District of Maryland, and had engaged space in The Washington Herald in which he was daily publishing matter relating to his campaign. It was in this space that the article in question appeared. It is set out in the declaration as follows:

"'Warner's Political Contest.'"

"(Meaning thereby the contest of said defendant, Brainerd H. Warner, for said nomination for the office of Representative in the Congress of the United States from the Sixth Congressional District of Maryland, aforesaid).

"'Col. Pearre (meaning thereby Honorable George A. Pearre, a Representative in the Sixtieth Congress of the United States from the Sixth Congressional District of Maryland) said in his great onslaught on Mr. Warner (meaning the defendant Brainerd H. Warner) a few days ago:

"'"I regard his candidacy as a joke. If I had a monkey and hand-organ, I could get up a crowd anywhere."

"'This was a fine expression for a statesman (meaning said Pearre), but not wanting in dignity so much as a justice of the Supreme Court of the District of Columbia (meaning thereby the Honorable Ashley M. Gould, Associate Justice of the Supreme Court of the District of Columbia) who, with the United States District Attorney (meaning the plaintiff), went to Rockville (meaning the town of Rockville, County of Montgomery, State of Maryland) last Saturday (meaning Saturday, the 21st day of March, A. D. 1908) to attend a conference of Mr. Warner's (meaning defendant Brainerd H. Warner) enemies and determine what ammunition was needed to defeat him.

"'The question now is, Where does the money come from in the contest against Mr. Warner? (Meaning the defendant Brainerd H. Warner.)

"'How about the race track?

"'LAWYER.'"

It is alleged that The Washington Herald had a large circulation in the District of Columbia and elsewhere in the United States and foreign countries; that defendant published said article maliciously, contriving to injure plaintiff in his good name, fame and credit, and to bring scorn, public scandal, infamy and disgrace upon him, and to injure him in his office as United States Attorney. This, in substance, comprises the inducement and colloquium of each of the two counts.

To the first count an innuendo is added interpreting the article and charging defendant with meaning thereby and intending to convey, and actually conveying, that the said plaintiff entered into a conference with certain persons at Rockville for the purpose of

determining in what way sufficient funds could be raised to conduct the campaign on behalf of said Pearre against the defendant, and meaning thereby that plaintiff was obtaining money or funds for that purpose from the Washington Jockey Club or persons making wagers at the race-track, and meaning and tending to convey the idea that plaintiff was corrupt in the conduct of his office in not prosecuting such persons in consideration of money being furnished for use in said political campaign. It is also alleged that defendant, by means of the article, meant and intended to charge plaintiff with being corrupt in the performance of his official duties, and that, as a result, plaintiff had been greatly injured and damaged in his good name, fame and reputation.

The innuendo to the second count simply alleges that by the publication defendant meant and intended to charge that the plaintiff was acting corruptly in the performance of his official duties; that he was being influenced in the discharge thereof by the contribution of money by persons interested in gambling at said race-track; and that the money so contributed was being used against the defendant's candidacy for Congress. Then followed the usual averment of injury and damage. The cause was tried to a jury, and a verdict returned for plaintiff. From the judgment thereon, the case comes here on appeal.

In the course of the trial, defendant, testified, among other things, that the article in fact was intended as a criticism upon plaintiff's going into the State of Maryland to engage in politics in violation of the civil service regulations of the United States. On cross examination, for the purpose of showing malice, he was interrogated in respect to certain communications addressed by him to the Attorney-General of the United States, for the purpose of securing, if possible, the discharge of plaintiff from his office. Defendant was also asked, over objection of his counsel, whether he had not sought the aid of one Kroll, a civil service employee of the Government, to assist him in his campaign for Congress, which he positively denied. Kroll was offered as a witness in rebuttal to contradict the above denial of defendant. He was permitted, over objection, to testify that defendant had sought his aid in conducting his campaign.

In any view of the case, the admission of this evidence was reversible error. It related to a collateral transaction, and introduced, through the cross examination of defendant, an issue not directly involved in the case. Nothing that defendant had testified to justified reference to this incident on cross-examination. The test of its admissibility, in the way in which it was offered is, whether or not plaintiff would have been entitled to prove as part of his case in chief that defendant had attempted to employ Kroll. The application of this test clearly suggests the error. That the evidence was highly prejudicial to defendant is apparent, in that his integrity was thus impeached, and the jury improperly permitted to consider it in reaching the verdict.

The chief ground of attack by counsel for defendant relates to the action of the court below in denying a motion in arrest of judgment. Defendant alleged in the motion that the judgment should

be arrested for the reason that in neither the inducement nor the colloquium of the declaration is it alleged that the words complained of referred to the unlawful obtaining of money by plaintiff in his official capacity from the race-track gamblers for the purpose of conducting a campaign against defendant, or for any other purpose, in consideration of which plaintiff agreed to refrain, or did refrain, from prosecuting the gamblers or from performing any of his official duties. Nowhere in the declaration does the equivalent of the above allegation appear, except indirectly in the innuendo. This is not sufficient, unless the words themselves contain the charge.

Counsel for plaintiff seem to have proceeded upon the theory that the words spoken were sufficient to sustain the legal inference of the above charge. It is essential, therefore, to consider whether the words used are in themselves actionable. While the rule is somewhat indefinite, we find a safe one in Brooker vs. Collin, 5 Johns. 188, and one fully supported by the cases: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." Measured by this test, the words used in the publication are not in themselves actionable. They will admit of an interpretation which amounts to nothing more than a permissible criticism of the conduct of plaintiff in his official capacity. Even considering, in connection with the motion in arrest, the public agitation over race-track gambling and the general criticism of plaintiff's conduct in connection therewith, the article standing alone may well be interpreted as a criticism upon plaintiff's neglect of duty in leaving his official jurisdiction and going into the State of Maryland to engage in a political contest, when he ought to have been prosecuting the race-track gamblers, or a criticism upon the impropriety of a public official engaging in a political contest in violation of the civil service regulations of the Government. The inquiry as to where the money was to come from might naturally arise from the fact that a political campaign was in progress. The article is as clearly susceptible of this interpretation as of the inference that plaintiff was corruptly refraining from prosecuting the race-track gamblers in consideration of their furnishing the money with which to conduct the campaign against defendant.

It is true that the declaration contains the following statement: "Which said false, scandalous, malicious and defamatory libel was composed and published, and caused and procured to be composed and published as aforesaid by the said defendant, of and concerning the said plaintiff, said defendant meaning and intending thereby to charge that the said plaintiff was a corrupt, dishonest and unworthy person, and was being influenced in the discharge of his duties as United States Attorney for the District of Columbia by the fact that some person or persons or company, interested in said race track or course, or in the contests thereon, or in having betting, wagering and gambling permitted thereon, was contributing money to be used against the candidacy of the said defendant, Brainerd H. Warner, for the office of Representative in the Congress of the United States as aforesaid, by means of which said false and scanda-

lous libel the plaintiff has been and is very greatly injured in his good name, fame and reputation, and brought into scorn, scandal, infamy and disgrace in so much as divers good and lawful citizens have, by reason of the grievance aforesaid, suspected and believed and still do suspect and believe the plaintiff to be guilty of the acts set out and charged and intended to be charged in said publication, and to have been guilty of bad and improper conduct so charged of and concerning him, and have, by reason of the committing of said grievance, from hence until now, believed the plaintiff to be a dishonest and unworthy person and to have been guilty of the wrong alleged of him as the United States Attorney for the District of Columbia aforesaid."

This is only plaintiff's interpretation by way of innuendo of the meaning of the words used in the alleged libelous article. It is far from a direct averment that defendant, by the language used, and from the logical meaning thereof, as set forth in the innuendo, charged the plaintiff with corruptly receiving money from the race-track gamblers to be used in the campaign against defendant. In fact, counsel admit as much in their brief where they say, "Assuming the existence of the facts set forth in the declaration, the article in question is, we respectfully submit, libelous per se." Counsel for plaintiff and the court below have acted throughout this entire proceeding upon the mistaken assumption that the article complained of is ex vi termini actionable.

The innuendo is only essential to explain the meaning of the words used. It is well settled that words that are not in themselves actionable cannot be made so by innuendo, but must be aided by proper averment and colloquium. "The office of an innuendo is often mistaken by pleaders. It cannot extend the sense of the words spoken, beyond their own natural meaning, unless something is set upon the record, to which the words spoken may be referred, and by which, they may be explained by the innuendo." McCuen v. Ludlum, 17 N. J. L., 12.

It is the office of the inducement "to narrate the extrinsic circumstances which, coupled with the language published, affects its construction, and renders it actionable; where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him not to affect him injuriously." Townsend Sl. & L., 3rd ed., sec. 308. The colloquium is a direct allegation that the language used was concerning the plaintiff, or referred to him and his affairs, or related to plaintiff and the facts alleged as inducement.

As before suggested, nowhere in the inducement or colloquium is there any averment to the effect that the words published had any reference to the non-prosecution of the race-track gamblers or to the illegal or improper obtaining of money from them by reason of such non-prosecution, or non-performance of official duty, or that the words published charged plaintiff with the crime of corruptly withholding the prosecution of the race-track gamblers in consideration of their furnishing money, either to him, or for the purpose of conducting the campaign against defendant.

Whether or not the charges imputed the commission of a crime

by plaintiff was a question of fact for the jury, but the jury was powerless to determine this issue unless it appeared upon the record, and it could only appear by a proper averment in the declaration. The rule announced in England in Rex vs. Horne, decided in the House of Lords, and reported in 2 Cowp., 672, has been generally adopted in this country. Lord Chief Justice De Grey said: "As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage. * * * Where the circumstances go to constitute a crime, they must be set out: Where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence * * * But, if the terms of the writing are general, or ironical, or spoken by way of allusion or reference, although every man who reads such a writing may put the same construction upon it, it is by understanding something not expressed in direct words, and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just and the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appears upon the record; which it cannot do without an averment."

In Pollard vs. Lyon, 91 U. S., 225, the court said: "When words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that the words naturally bear, unless connected with proper introductory averments. Alexander vs. Angle, 1 Crompt. & J., 143; Goldstein vs. Foss, 2 Younge & J., 146; Carter vs. Andrews, 16 Pick., 5; Beardsley vs. Tappan, 3 Blatchf. 497." In this opinion the court approved the rule announced in certain leading Pennsylvania cases "that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous, to the material subject-matter properly on the record, by way of averment or colloquium. Gosling vs. Morgan, 32 Pa. St., 275; Shaffer vs. Kintzer, 1 Binn., 537; M'Clurg vs. Ross, 5 Binn., 218; Andres vs. Koppenheafer, 3 Serg. & R., 255."

The futility of the pleader's attempt to embrace the necessary averment in the innuendo, where the words are not in themselves actionable, is well expressed by Chief Justice Shaw in Carter vs. Andrews, 16 Pick., 1, where an auctioneer at the public sale of a library used the following words: "We offer these books under a

lisadvantage; for the library has been plundered by Deacon James
G. Carter, of this town." In holding these words not slanderous
per se, and referring to the insufficiency of the declaration, the
learned Chief Justice said: "If the words have the slanderous mean-
ng alleged, not by their own intrinsic force, but by reason of the
existence of some extraneous fact, the plaintiff must undertake to
prove that fact, and the defendant must be at liberty to disprove
it. The fact then must be averred in a traversable form, with a
proper colloquium, to wit, an averment, that the words in question
are spoken of and concerning such usage, or report, or fact, what-
ever it is, which gives to words, otherwise indifferent, the particular
defamatory meaning imputed to them. Then the word, 'meaning,'
or 'innuendo,' is used with great propriety and effect, in connecting
the matters thus introduced by averment and colloquia, with the
particular words laid, showing their identity, and drawing what is
now the legal inference from the whole declaration, including the
averments and colloquia, that such was, under the circumstances
has set out, the meaning of the words used. These rules are neces-
ary to bring a case of slander within the well known rules of plead-
ng, which require that a declaration shall contain enough to give
notice to the defendant, of all the material facts intended to be
proved, and to enable the court to perceive from the record, that a
good title is set out by the plaintiff: to enable him to have a judg-
ment."

It follows that no colloquium or averment of extraneous matter
s necessary where the publication is libelous upon its face. If,
owever, the words are not defamatory per se, the defamatory mean-
ng must be set out in the inducement, and this meaning or applica-
on must appear by proper averment in the colloquium. Where
he person alleged to have been defamed, as in the present case, is
luded to in ambiguous terms, full and explicit averment is essential
show the application of the language used. The extrinsic facts
ust be separately and distinctly alleged as traversable facts.

If words are actionable per se, no innuendo is required. But if
e words used do not import libelous or slanderous defamation on
eir face, their meaning must be made to appear by innuendo.
he innuendo refers to matter already expressed, and explains the
eaning of the words used and to designate the name of the person
leged to have been libeled, when referred to in ambiguous terms. It
erefore, adds nothing to the natural meaning and sense of the
nguage used, except to connect the language employed with the ex-
nsic facts averred.

Applying this universal rule, a mere glance is sufficient to reveal
w far the language used in the article before us fails on its face,
thout intervention both of proper averment and innuendo, to im-
te to plaintiff the meaning here sought to be placed upon it
sted by this rule, it will be found that nothing is contained in the
claration, except in the innuendo, to indicate even remotely that
e words published had reference to the failure of plaintiff to prose-
e the race-track gamblers or to his illegally and corruptly obtain-
g money from them in consideration of the non-performance of
official duty. This is not alleged in the publication itself, and

must appear by proper averment in the declaration. Since it does not so appear, the declaration must be held to be fatally defective.

The defendant was permitted in the course of the trial to testify to what he meant, or had reference to, by the words used in the article of March 28th. He testified "that the reference in it to Col. Pearre's statement in regard to a monkey and a hand-organ was for the purpose of showing what the defendant considered a very undignified proceeding on the part of a candidate for Congress; that this second reference in the article was the statement of an objection by him to the action of the United States District Attorney in going outside of the District for which he was appointed to indulge in political conferences, and lowering the dignity of a Presidential appointment, which was quasi judicial, in the estimation of the defendant, and which by time-honored custom excluded this sort of petty participation in politics; that the clause of the article, 'to determine what ammunition was needed to defeat Warner,' was an explanation to the readers to show why they went there, the defendant having information that the District Attorney acted as floor manager at that conference, and asked the representatives from the different districts how much money and what other means were necessary to defeat the defendant, the representatives being called up one by one, and sent out into the hall to get the necessary ammunition, there being in that room at that time, in violation of the spirit of the Civil Service, several postmasters, one employee at least of a Department of the Government and a United States District Attorney, which circumstance the defendant put up for the consideration of the readers of the paper, as being what he considered improper conduct; that the reference in the article to where the money came from in the contest against the defendant was because the witness wished to know that—it had been alleged that he had circulated money through the county, and he wanted to know where this money was coming from, whether from these Government employees, or whether it was given by Mr. Pearre or by Mr. Blair; and that with respect to the concluding paragraph of the article 'How about the race track'? the defendant had no idea or thought of libeling the plaintiff, that he did not consider that he or any other officer in his position would be fool enough to reach out his hand and take money from the race track for any political or campaign purposes; that the air had been full of this race track business for a long time past, defendant's attention had been called to it, he had, himself, endeavored to aid in breaking up the race track and pool selling, that objections to it were coming from every class of the community, from mothers, fathers, teachers, preachers, and it all centered, whether justly or not, on the office of the United States District Attorney; that the defendant had no personal feeling against the plaintiff, but thought he was wrong in going to that conference and lowering the dignity of the office, and that he was wrong in not making any response to this public clamor, coming, not only from citizens, but from the Commissioners, and that he ought to have remained at home and given the very closest attention to the suppression of that evil."

The testimony of a defendant to explain to the jury the meaning

ded to convey by the word used in an alleged libelous article
tial to determine whether the meaning ascribed to it by the
lo is correct. "It is for the court to determine whether a
ion is susceptible of the meaning ascribed to it by the in-
and for the jury to find whether such meaning is truly
to it." Barnes vs. State, 88 Md., 347. His testimony was
per on the question of malice. "The motives or purpose
ich the words were spoken, lie at the very foundation of
They are the very conditions upon which exemplary or
damages are predicated, and no good reason appears why
t should not be permitted to prove what his motives were."
vs. Ingram, 122 Mo., 355, 373. See also Odgers on Libel
r, 317; Townsend on Slander & Libel, sec. 91; Bennett vs.
3 Hun., 50, 53; Wilson vs. Noonan, 35 Wis. 321, 353.
nne vs. Parsons, 57 Conn., 73, 81.

ffect of the defendant's testimony, however, was withdrawn
jury by the first instruction given by the court at the re-
plaintiff, which was as follows:

u find from the evidence that at the time of the publica-
he article described in the declaration the following were
nely,

he plaintiff was United States Attorney for the District of
;

here was in said District a race track at which were being
of horses;

t that track betting or making wagers on the results of
was being carried on;

t was believed or claimed by some that the said betting or
wagers, or the permitting of the same, could be prevented
osecution in that behalf by the plaintiff as such District
of the persons engaged in or permitting the said betting or
wagers;

he plaintiff in fact did not prosecute the said persons or
em;

he defendant was engaged in a contest in the County of
ry, State of Maryland, for nomination as a candidate for
of Representative in the Congress of the United States
Congressional district embracing said County;

is opponent in said contest for such nomination was the
arre, in the said article mentioned;

the said contest the plaintiff supported the candidacy of
arre and opposed that of the defendant, and

he defendant wrote and procured the publication of the
;

ou are instructed, as matter of law, that the said article
and that your verdict should be for the plaintiff, and that
uestion for your determination is what amount of dam-
laintiff is entitled to recover of the defendant by reason
lication of said article."

truction is clearly erroneous, because it takes from the
onsideration of the meaning to be attached to the words
publication. It is based upon the mistaken assumption

and interpretation of the court that the words used are libelo per se. In other words, to sustain this instruction, it must be he that, as matter of law, the words used mean, on their face, not on that the money to defeat defendant came from the race-trac gamblers, but that the plaintiff was obtaining it corruptly in co sideration of his refusal to prosecute them. These facts could n be properly adduced from the language of the article itself, b were matters for averment and proof. "The plaintiff must pro the truth of the colloquium, or the application of the words to hin self, and to the extrinsic matters alleged in the declaration, whe these are material to his right to recover." 2 Greenl. Ev., sec. 41

The same error was committed by the court in giving plaintiff second instruction, which was to the effect that, if the jury believe that defendant published the article, then upon that fact alo malice is presumed, and "plaintiff is entitled to recover compens tion for the injury done to his reputation by the tendency of suc publication to bring him into disgrace and disrepute," and for th mental suffering he endured. By this instruction, defendant's co struction of the meaning he intended to convey by the words use as touching both on the question of malice and injury to plaintiff reputation, was withdrawn from the jury. These were purely que tions of fact for the jury to determine from a consideration of a the evidence in the case.

It is unnecessary to consider the objections made to the other in structions of the court and to the failure of the court to give certai instructions requested by the defendant, since the court's charge almost entirely based upon the erroneous assumption that the wor complained of are libelous per se.

It may be accepted as settled law that where the words used ar unambiguous and clearly libelous on their face, incapable of an in nocent meaning, and there is no evidence in the case tending t change their natural meaning, it is the duty of the court in civ actions to instruct the jury that as matter of law they are libelou But if the language is ambiguous and susceptible of two meaning one libelous and the other not, it is for the jury to decide in wha sense it was actually used. In the case at bar the jury was not pe mitted, under the foregoing instructions, to determine the sense i which the language was used. The interpretation placed upon it b the plaintiff is exactly the reverse of that given it by defendant, an the right to say which was correct should have been left to the jur

It is argued that no exception appears to have been taken to th denial of the motion in arrest of judgment, and, therefore, th question of the sufficiency of the declaration is not properly befo us. In support of this contention our attention is directed to th case of Rodriguez vs. United States, 198 U. S., 156. In that ca there was a motion in arrest of judgment, the motion being directe to a defect in drawing the grand jury. The court held that th question was not before it, inasmuch as no exception had been pre served to the ruling of the court denying the motion in arrest. I Smith vs. Ross, 31 App. D. C., 348, where this court made a simila holding, the motion was directed to an alleged error of the court i removing the case from the stet calendar to the trial calendar. I

these cases, the error was one that defendant might waive, and, in such cases, where no exception is taken to the ruling of the court, he will be deemed to have waived the objection.

In the case at bar, however, a different and broader question is presented. The declaration wholly fails to state a cause of action. In such a case, the defendant may avail himself of the defect either by motion in arrest or on error in the appellate court. It is not such a defect as he will be deemed to have waived. In bank of the United States vs. Smith, 11 Wheat. 171, the court said: "The doctrine of the King's Bench, in England, in the case of Cort vs. Birkbeck (Dougl. Rep., 208) that, upon a demurrer to evidence, the party cannot take advantage of any objections of the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence is sufficient to maintain the issue. And the judgment of the court upon such evidence, will stand in the place of the verdict of the jury. And, after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error." In Reynolds vs. Stockton, 140 U. S., 254, it was held that a judgment rendered not responsive to the issue presented by the pleadings may be assailed for the first time in an attempt to enforce the judgment in a sister State, notwithstanding the full faith and credit clause of the Constitution. (Const. U. S., Art. III, sec. 1.)

It may be suggested that this defect was called to the attention of plaintiff by motion in the court below, when he could have amended without delay, but he elected to stand upon his declaration. It was again presented by motion in arrest after judgment but still he refused to avail himself of his rights. It is will settled that a defect of this character may be raised in the first instance in the appellate court by writ of error, without demurrer, motion in arrest or other proceeding below. Shacum vs. Pomery, 6 Cranch, 221; Cragin vs. Lovell, 109 U. S., 191; Telegraph Co. vs. Sklar, 126 Fed., 295; Clement vs. Fisher, 7 Barn. & Cress., 459.

The motion in arrest should have been granted. The judgment is reversed with costs, and the cause remanded with directions to arrest the judgment.

Judgment arrested.

MONDAY, *March 6th*, A. D. 1911.

No. 2102. January Term, 1911.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in

this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court with directions to arrest the judgment.

Per Mr. JUSTICE VAN ORSDEL.

March 6, 1911.

In the Court of Appeals of the District of Columbia.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

Motion.

To the end that any question as to the finality of the judgment of this Court in this case may be concluded without any further proceedings, expense, or delay, in this Court or the Court below, so that this cause may be speedily reviewed by the Supreme Court of the United States, the appellee, without prejudice to any of his rights in the premises, insisting on the sufficiency of his declaration and the record herein, and electing to stand thereon, moves the Court as follows:

(1) To amend its said judgment by adding thereto a direction to the Court below to enter a judgment that the plaintiff take nothing by his writ and that the defendant go thereof without day.

(2) To allow a writ of error to the Supreme Court of the United States on the said judgment so amended.

(3) To fix the bond for costs, on said writ of error, and also for supersedeas.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Appellee.

Notice.

The appellant will take notice that the foregoing motion will be called to the attention of the Court on Monday, March 20, 1911, at ten o'clock, A. M., or as soon thereafter as counsel can be heard.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Appellee.

Messrs. J. J. Darlington and W. C. Sullivan, Attorneys for Appellant.

Acknowledgment.

Service of copy of above motion and notice acknowledged this 16th day of March, A. D. 1911.

J. J. DARLINGTON,
W. C. SULLIVAN,
Attorneys for Appellant.

Endorsed:) No. 2102. Brainerd H. Warner, Appellant, vs. niel W. Baker, Appellee. Motion to amend judgment and allow t of error to Supreme Court U. S., &c. Court of Appeals, District Columbia. Filed Mar. 17, 1911. Henry W. Hodges, Clerk.

MONDAY, *April 3rd, A. D.* 1911.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

The motion to amend the judgment and allow a writ of error to Supreme Court of the United States in the above entitled cause submitted to the consideration of the Court by Mr. Henry E. is, of counsel for the appellee, in support of motion, and by Mr. C. Sullivan, on behalf of counsel for the appellant, in opposi- thereto.

TUESDAY, *April 4th, A. D.* 1911.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

n consideration of the appellee's motion to amend the judgment he above entitled cause, It is by the Court this day ordered that motion be and the same is hereby denied.

In the Court of Appeals of the District of Columbia.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER, Appellee.

Petition for Writ of Error.

ow comes Daniel W. Baker, appellee herein, and says that on 5th day of March, 1911, this Court entered judgment herein in of the appellant, Brainerd H. Warner, by which the judg- of the Court below was reversed with costs and the cause re- led with direction to arrest the judgment, in which said judg- of this court and the proceedings had prior thereto, certain s were committed to the prejudice of this appellee, all of which more fully appear from the assignment of errors which is filed this petition.

Wherefore, the appellee prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the penalty of a bond for costs may be fixed by this Court.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Appellee.

(Endorsed:) No. 2102. Brainerd H. Warner, Appellant, vs. Daniel W. Baker, Appellee. Petition for writ of error. Court of Appeals, District of Columbia. Filed May 29, 1911. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER, Appellee.

Assignment of Errors.

Comes now Daniel W. Baker, appellee, by his counsel, Mr. Henry E. Davis and Mr. Frank J. Hogan, and respectfully represents that he feels himself aggrieved by the proceedings and judgment of the Court of Appeals of the District of Columbia in the above-entitled cause, and (without prejudice) assigns error thereto as follows:

1. The court erred in holding that the "declaration must be held to be fatally defective" and that it wholly fails to state a cause of action.

2. The court erred in holding that the instant declaration in libel must be tested by its sufficiency as a declaration in slander for the same words if spoken.

3. The court erred in holding that the declaration is bad in substance, because "the defamatory meaning must be set out in the inducement, and this meaning or application must appear by proper averment in the colloquium," and not elsewhere in the declaration than in the inducement and colloquium.

4. The court erred in holding that if the particular meaning ascribed to the libel by the innuendo is not fully borne out by the publication itself, the action can not be maintained even though the article is otherwise libelous.

5. The court erred in holding that the writing declared on is not libelous or actionable on its face.

6. The court erred in holding that the libel declared on is not actionable, because "the words are not actionable in themselves."

7. The court erred in holding that the libel declared on is not actionable unless the same words if spoken are actionable as slander.

8. The court erred in holding that the instant libel, which the appellant composed and caused to be printed and published in a newspaper of large circulation, "maliciously, contriving to injure plaintiff in his good name, fame, and credit, and to bring scorn, public scandal, infamy, and disgrace upon him, and to injure him in his office as United States Attorney," is not actionable, because "the words spoken" will not "subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment," and "measured by this test, the words used in the publication are not in themselves actionable."

9. The court erred in holding that the libel declared on is not actionable in itself, because "the words spoken" do not make a "charge (which), if true, will subject the appellee to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment * * * Measured by this test, the words used in the publication are not in themselves actionable."

10. The court erred in holding that the granting of the appellee's first instruction to the jury was erroneous.

11. The court erred in holding that the granting of the appellee's second instruction to the jury was erroneous.

12. The court erred in holding that the judgment on the verdict should be arrested.

13. The court erred in holding that the writing declared on "amounts to nothing more than a permissible criticism of the conduct of plaintiff in his official capacity."

14. The court erred in reversing the judgment of the Supreme Court of the District of Columbia with costs and in remanding the cause with directions to arrest the judgment.

15. The court erred in holding that the cross-examination of the appellant in respect to certain communications addressed by him to the Attorney General of the United States for the purpose of securing the discharge of the appellee from his office, was erroneous.

16. The court erred in holding inadmissible the testimony of the witness Kroll, the ruling of the court in this respect being as follows:

"In the course of the trial, defendant testified, among other things, that the article in fact was intended as a criticism upon plaintiff's going into the State of Maryland to engage in politics in violation of the civil service regulations of the United States. On cross-examination, for the purpose of showing malice, he was interrogated in respect of certain communications addressed by him to the Attorney General of the United States, for the purpose of securing, if possible, the discharge of plaintiff from his office. Defendant was also asked over objection of his counsel, whether he had not sought the aid of one Kroll, a civil service employee of the Government, to assist him in his campaign for Congress, which he positively denied. Kroll was offered as a witness in rebuttal to contradict the above denial of defendant. He was permitted, over objection, to testify that defendant had sought his aid in conducting his campaign.

"In any view of the case, the admission of this evidence was

reversible error. It related to a collateral transaction, and introduced, through the cross-examination of defendant, an issue not directly involved in the case. Nothing that defendant had testified to justified reference to this incident on cross-examination. The test of its admissibility in the way in which it was offered is, whether or not plaintiff would have been entitled to prove as part of his case in chief that defendant had attempted to employ Kroll. The application of this test clearly suggests the error. That the evidence was highly prejudicial to defendant is apparent, in that his integrity was thus impeached, and the jury improperly permitted to consider it in reaching the verdict."

17. The court erred in holding that "the testimony of a defendant to explain to the jury the meaning he intended to convey by the words used in an alleged libelous article is essential to determine whether the meaning ascribed to it by the innuendo is correct."

18. The court erred in other respects apparent of record.

Wherefore, and on account of the said manifest errors and each of them, the said Daniel W. Baker prays that the said judgment of the said Court of Appeals of the District of Columbia may be reversed by the Supreme Court of the United States, and that the said Court of Appeals may be directed to affirm in all respects the judgment of the Supreme Court of the District of Columbia in this cause.

HENRY E. DAVIS,
FRANK J. HOGAN,
Attorneys for Appellee.

(Endorsed:) No. 2102. Brainerd H. Warner, Appellant, vs. Daniel W. Baker, Appellee. Assignment of Errors. Court of Appeals, District of Columbia. Filed May 29, 1911. Henry W. Hodges, Clerk.

MONDAY, *May 29th*, A. D. 1911.

No. 2102.

BRAINERD H. WARNER, Appellant,
vs.
DANIEL W. BAKER.

On motion of Mr. F. J. Hogan, of counsel for the appellee, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Brainerd H. Warner, Appellant,

and Daniel W. Baker, Appellee, a manifest error hath happened, to the great damage of the said appellee as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

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(*Bond on Writ of Error.*)

Know all men by these presents, that we, Daniel W. Baker, as principal, and Edward P. Schwartz, as surety, are held and firmly bound unto Brainerd H. Warner in the full and just sum of Three Hundred Dollars to be paid to the said Brainerd H. Warner his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind our-selves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of June, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Brainerd H. Warner, Appellant, and Daniel W. Baker, Appellee, a judgment was rendered against the said Daniel W. Baker and the said Daniel W. Baker having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Brainerd H. Warner citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Daniel W. Baker shall prosecute said writ of error to effect, and

answer all costs if he fail to make his plea good, then the a
obligation to be void; else to remain in full force and virtue.

DANIEL W. BAKER. [SEAL
EDWARD P. SCHWARTZ. [SEAL

Sealed and delivered in the presence of—
JOSEPH C. SHEEHY,
CHAS. M. BIRCKHEAD.
As to E. P. S.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2102. Brainerd H. Warner, Appellant, Daniel W. Baker. Bond on Writ of Error to Supreme Court U Court of Appeals, District of Columbia. Filed Jun- 1, 1911. He W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Brainerd H. Warner, Greeting:

You are hereby cited and admonished to be and appear a Supreme Court of the United States, at Washington, within 30 d from the date hereof, pursuant to a writ of error, filed in the Cle Office of the Court of Appeals of the District of Columbia, wher Daniel W. Baker is plaintiff in error, and you are defendant error, to show cause, if any there be, why the judgment rende against the said plaintiff in error as in the said writ of error m tioned, should not be corrected, and why speedy justice should be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Co of Appeals of the District of Columbia, this 1st day of June, in t year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the
District of Columbia.

Service acknowledged June —, 1911.
J. J. DARLINGTON,
Counsel for B. H. Warner.

[Endorsed:] Court of Appeals, District of Columbia. Filed Ju 1, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the Di trict of Columbia, do hereby certify that the foregoing printed an typewritten pages numbered from 1 to 118 inclusive contain a tru

opy of the transcript of record and proceedings of said Court of Appeals in the case of Brainerd H. Warner, Appellant, vs. Daniel W. Baker, No. 2102, April Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this th day of June, A. D. 1911.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,733. District of Columbia Court f Appeals. Term No. 326. Daniel W. Baker, plaintiff in error, s. Brainerd H. Warner. Filed June 13th, 1911. File No. 22,733.